RECORD, CASE No. [illegible]

SUPREME COURT OF THE [illegible]

OCTOBER TERM, [illegible]

TERM No. [illegible] 3

JAMES HAMPDEN ROBB AND CHARLES E. [illegible], TRUSTEES, APPELLANTS,

vs.

AUGUST VOS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 12, 1903.

RECORD, CASE No. 14,267.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 252.

JAMES HAMPDEN ROBB AND CHARLES E. STRONG, TRUSTEES, APPELLANTS,

vs.

AUGUST VOS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

JAMES HAMPDEN ROBB *et al.*, Complainants,
vs.
AUGUST VOS *et al.*, Defendants.
} In Chancery.

Be it remembered that heretofore, to wit, on the 31st day of May, in the year of our Lord one thousand eight hundred and eighty-eight, came the complainants, James Hampden Robb *et al.*, by their solicitors, Harmon, Colston, Goldsmith & Hoadley, and filed in the clerk's office of said court their certain bill of complaint herein against the defendants, August Vos *et al.* Said bill of complaint is clothed in the words and figures following, to wit:

Bill of Complaint.

2 Circuit Court of the United States, Southern District of Ohio, Western Division. In Chancery.

To the honorable judges of the circuit court of the United States for the southern district of Ohio, western division:

James Hampden Robb, of the city of New York and a citizen of the State of New York, and Chas. E. Strong, of the city of New York and a citizen of the State of New York, bring this their bill against August Bos, of the city of Covington and a citizen of the State of Kentucky, and William Stix, of the city of St. Louis and a citizen of the State of Missouri, and Moritz Loth, of the city of Cincinnati and State of Ohio, and thereupon your orators complain and say—

That your orators are citizens and residents of the State of New York, and that the defendant August Vos is a citizen and resident of the State of Kentucky, and that the defendant William Stix is a citizen and resident of the State of Missouri, and that the said Moritz Loth is a resident of the city of Cincinnati and a citizen of the State of Ohio; and your orators further say that heretofore, to wit, on the 5th day of February, A. D. 1885, they became and were seized, as trustees in fee simple, of all those certain tracts or parcels of land lying, being, and situate in the city of Cincinnati, Hamilton county, Ohio, and described as follows, to wit:

3 Lying on the westerly side of Vine street north of Mulberry St., to wit: Lots 3, 4, and 5, of 20 feet front each, of the subdivision of a tract of land beginning at the west side of Vine St.

at a line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet and extending back westwardly of the same width 132 feet, commencing for numbers from the south, making five lots of 20 feet front each, said lots 3, 4, and 5 being 60 feet in front on the west side of Vine street, said lots being the same property conveyed by John Shelley to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilotn county, Ohio, and also by E. B. Reeder to Moritz Loth by deed recorded in Book 401, page 387, records of deeds of Hamilton county, Ohio.

And also all that other real estate situated in said city of Cincinnati, to wit: All that part of lot marked and numbered 2, block 12, in the plat of subdivision laid out by Gen. James Findlay, J. C. and I. L. Ludlow, recorded in Book 49, page 420 and 422, as now subdivided by the commissioner in case of partition of James and John Findlay, which fronts 50 feet on the west side of Vine street, extending westwardly of the same width in rear as in front to the depth of 100 feet. Said lot 2, in said block 12, Findlay and Ludlow subdivision, was set off by the Findlay commissioners to John Keene Findley, and was conveyed by said John Keene Findlay to said Morits Loth by deed recorded in Book 358, page 571, of the records of deeds of Hamilton county, Ohio; also all that part of lot 4, in the plat of the subdivision made by Findlay's commissioners of block 12 on the said plat of the subdivision laid out by Findlay and Ludlow, as fronts 50 feet on the west side of Vine St., extending back westwardly of even width in rear as in front to the
4 *the* depth of 100 feet, said 50 feet front on the west side of Vine street by 100 feet deep being the same property set off with the rest of said lot 4 by Findlay's commissioners to James F. Irwin and conveyed by said James F. Irwin to said Morits Loth by deed recorded in Book 389, page 320, of the records of deeds of Hamilton county, Ohio.

Also that certain other lot in the city of Cincinnati aforesaid, adjoining the westerly line of the lot last described, fronting 17 feet on the west side of Vine street, running back westwardly of even width in rear as in front to the depth of 100 feet, said lot being 17 feet off the westerly part of lot 5 as marked by Findlay's commissioners on the plat of subdivision of block 12 of Findlay and Ludlow's subdivision aforesaid, the said lot being the property heretofore conveyed to Moritz Loth by the Frankling Bank of Cincinnati by deed recorded in Book 401, page 381, of the records of deeds of Hamilton county, Ohio.

Your orator further says that said premises were conveyed to them as trustees as aforesaid on the day aforesaid by one Moritz Loth by deed duly recorded in the recorder's office of Hamilton county, Ohio, in Deed Book 377, page 569, on the day aforesaid, and that the consideration paid therefor by your orators to the said Loth was $10,000.

And your orators further say that on said day, to wit, February 5th, 1885, they made, executed, and delivered unto the said Moritz Loth a certain indenture of lease, duly recorded on said day *of* the

recorder's office of Hamilton county, Ohio, to wit, in lease Book 78, page 99, whereby they did lease and demise unto the said
5 Moritz Loth and assigns the premises aforesaid for and *and assign the premises aforesaid for and* during the joint lives of one Ellen W. Robb and one Mary Robb and during the life of the survivor of them, said Loth and assigns yielding and paying therefor unto your orators as trustees during the term aforesaid, and for the further period of six months after the death of the said Ellen W. Robb, annually and proportionately for any fraction of a year at the rate of $600 per annum, payable in half-yearly installments of $300 each, the first instalment of $300 maturing August 5th, A. D. 1885.

And your orators further say that by said indenture of lease said Moritz Loth, for himself and assigns, did covenant and agree with your orators that he would, upon the death of the said Ellen W. Robb, pay to them within six months after the death of said Ellen as aforesaid the sum of $5,000 in case the said Mary be then living, but in case she be then dead the said Moritz Loth, for himself and assigns, did covenant and agree in said indenture of lease with your said orators that he would pay them the sum of $10,000 at the expiration of the said period of six months in the place and stead of the sum of $5,000 aforesaid; but in case the said Mary should be living at the expiration of said six months from the death of said Ellen, it was in said indenture of lease covenanted and agreed by said Moritz Loth, for himself and assigns, with your orators that he would pay them six months after said death of said Mary the sum of $5,000, and would pay during the period of said Mary's survivorship of the said Ellen rent at the rate of $300 per annum and proportionately for any fraction of a year, payable in half-yearly instalments of $150 each, until the death of said Mary.

6 And your orators further say that the said Moritz Loth by the terms of said indenture of lease did covenant and agree for *f*imself and assigns with the said your orators as trustees and their assigns that he would, without demand, pay during the term aforesaid the said sums as rent for said premises annually or proportionately for any fraction of a year in half-yearly inatalments at the several periods as hereinbefore mentioned, and also that he would pay all taxes and assessments, ordinary and extraordinary, that should be at any time during the time of said lease *be* levied or charged upon said premises at the times when they should become payable, and also that he would keep the improvements on said lots and lands in as good order and repair as they were at the date of said lease or as they might thereafter be put into during the term of such lease, and that he would repair and rebuild said premises in case of loss or damage by fire or accident and ordinary wear and tear, and that he would not do or suffer waste thereon, and that he would at his own expense keep said improvements on said premises insured in the sum of $5,000 in one or more insurance companies approved by your orators, the proceeds of such insurance in case of loss by fire to be applied towards the repairing or rebuilding of the same; and further stipulated and agreed for

himself and assigns that for the said payments stipulated to be made by the said Moritz Loth as above-mentioned and for the payment of taxes and assessments on said premises a lien was reserved in favor of your orators by said indenture of lease upon the
7 premises above described and upon the interests thereon of the said Moritz Loth by virtue of said indenture of lease prior and preferable to all other liens thereon whatsoever.

Your orators further say that it was stipulated by them in said lease that, all payments therein provided for being made and all the covenants therein to be observed by said lessee therein or his assigns being kept and performed, they would thereupon convey to the said Moritz Loth, his heirs and assigns, by deed of special warranty, warranting only against incumbrances by them made, the lands, tenements, and hereditaments hereinbefore described.

Your orators further say that both the said Ellen W. Robb and Mary Robb are living, and your orators say that, to wit, on the 13th day of November, A. D. 1885, one Meyer Gugenheim, having preciously recovered a judgment against the said Moritz Loth for the sum of $2,547.05 and having caused execution thereon to be issued and levied upon the premises herein described, brought a certain action, No. 74375, in the court of common pleas of Hamilton Co., Ohio, against the said Moritz Loth and your orators and against divers other persons and corporations, including the defendants herein, the object of which suit was to obtain a sale of the premises hereinabove described and of sundry other tracts of land in said county belonging to the said Moritz Loth and to subject the proceeds of sale of said lands after the payment of prior liens and incumbrances thereon to the satisfaction of his judgment aforesaid.

Your orators further say that the said Gugenheim in his petition in said suit did allege that your orators as trustees and that divers other persons therein named as defendants did have or claimed to have some lien upon or interest in the premises hereinbefore
8 described for some part thereof and did pray that your orators and said others be required to answer said petition setting up any right, claim, lien, or interest they had in or to said premises or any part thereof.

Your orators further say that on the said 13th day of November a summons was duly issued in said case by the clerk of said court to the sheriff of said county of Hamilton, commanding him to notify the defendants in said case, including your orators, that they had been sued by said Gugenheim in said court of common pleas of Hamilton county, Ohio, and that unless they answered by the 12th day of December, 1885, the petition of said Gugenheim against them said petition would be taken as true and judgment be rendered accordingly; and your orators further say that thereafter, to wit, on the 19th day of November, 1885, one Chas. A. Kebler, an attorney-at-law and member of the bar of Hamilton county, Ohio, and a practitioner at said bar, did, in the name of Kebler & Roelker, said Roelker being one Frederick G. Roelker, also an attorney-at-law and member of said bar and practitioner thereat and a partner of said Kebler in the practice of law at said city of Cincinnati, State

of Ohio, county of Hamilton, under the firm name of Kebler and Roelker, undertake and purports to accept service of summons on behalf of your orators by writing thereon as follows, to wit:

"We accept service of summons in the within cause of Chas. E. Strong and James Hampden Robb, trustees, and for William Stix this November 19th, 1885.

"KEBLER & ROELKER,

"*Attorneys for Above-named Defendants, Duly Authorized Thereto.*"

9 Your orators further say that neither the said Chas. A. Kebler nor the said Frederick Roelker nor the said firm of Kebler & Roelker had any authority to accept service of said summons for them or either of them, and that said acceptance of service of said summons is without any authority in fact or validity in law; and they further say that at the time of the commencement of said suit they were and each of them was and ever since have been and now are non-residents of — absent from the State of Ohio, and were residents of the State of New York, as the said Chas. A. Kebler well knew.

Your orators further say that the above is the only summons or process of any kind whatsoever that was ever issued for them in said suit or action of said Gugenheim, but that said *said* Chas. A. Kebler thereafter, on the 13th day of December, 1885, filed in said cause what purported to be an answer and cross-petition of your orators as trustees, wherin he set forth the interest of your orators in said premises as the same is hereinbefore alleged. They say that the said Kebler signed the said answer by using said firm name of Kebler & Roelker, and also swore to said answer, stating in his verification thereof that your orators were non-residents of the State of Ohio and were absent therefrom, as was the fact.

And your orators further say that said Chas. A. Kebler also attached as part of the said answer, prepared and filed by him as aforesaid, answers purporting to be on behalf of your orators to interrogatories addressed to them and attached to said petition, and that the said Kebler swore to each and every of the same as being within his personal cognizance.

10 Your orators further say that the said Chas. A. Kebler, in the name of the said firm of Kebler and Roelker, and being thereunto duly authorized, as your orators believe and aver, did on the — day of December, 1885, file in said suit in said court of common pleas an answer for one William Stix, the defendant herein and also a defendant in said suit of said Gugenheim, alleging that the said Moritz Loth and Fredericka Loth, his wife, did on the 30th day of March, 1885, duly executed and deliver unto the said William Stix their deed of mortgage, conveying unto him, his heirs and assigns, all the right, title, and interest of the said Moritz Loth in and to the premises hereinbefore described by virtur of the lease thereof as aforesaid from your orators to the said Moritz Loth, and also conveying other premises to secure payment by said Loth to said Stix of the sum of $10,000, payable six years after said March 30th, 1885, with 7 per cent. interest after maturity, payable quar-

terly, being a loan made by said Stix to the said Loth, and further alleging that said mortgage contained a condition whereby said sum of $10,000 would immediately become due upon the non-payment of any one of 25 promissory notes, all dated March 30th, 1885, made by said Moritz Loth to the order of said William Stix, each for $175, and each maturing consecutively at intervals of three months from said 30th day of March, 1885, during said perio*f* of 6 years, and did further allege that said mortga*te* was valid and in full force and the first and best lien on said leasehold premises and the real estate therein described, and did pray that said interest of said William Stix in said premises be protected, and that if said premises or any part thereof be sold that the first proceeds
11 thereof be used in the payment of the claim as aforesaid of said Stix.

Your orator- further say that thereafter, to wit, on the 24 day of July, 1886, said Chas. A. Kebler, as the authorized attorney of said William Stix, did, in the said firm name of Kebler & Roelker, file in said case, in said court of common pleas, an amended and supplemented answer and cross-petition of said William Stix, wherein it was alleged that certain of said promissory notes above mentioned for $175 each, to wit, those maturing 9, 12, and 15 months after said March 30th, 1885, respectively, have become due and payable and have not been paid, and further alleging that thereby said note of $10,000 had become immediately due and payable, and that said mortgage consequently had become absolute, and said answer and cross-petition did further pray for the appointment of a receiver to collect the rents payable by the occupants of said leasehold and other premises and for the sale of all the same to satisfy said sums secured by said mortgage and said claim, the same to be a first and best lien upon said premises described in said mortgage, and said answer and cross-petition did allege that your orators, as trustees, did have or claim*ed* to have some interest in the premises described in said mortgage, and did ask that they be served with process upon said cross-petition.

Your orator- further say that they nor either of them were ever served with any process upon the said cross-petition of said William Stix, and that no process for them or either of them was ever issued upon the same, and that they had no notice or knowledge whatever of said answer and cross-petition. But they say that on said
12 24th day of July, 1886, being the same day on which said answer and cross-petition *was* filed, the said Chas. A. Kebler, in the said firm name of Kebler & Roelker, prepared and filed in said cause what purported to be an answer of your orators to said cross-petition for said William Stix, wherein said Chas. A. Kebler, after reiterating therein the allegations in the former answer and cross-petition which were filed in said cause as purporting to be on behalf of your orators, did admit all the allegations contained in the cross-petition of said William Stix, but denied that the said mortgage mentioned in the said cross-petition of said William Stix was a lien on the leasehold properey hereinbefore described prior in time to the title thereto of your orators, but, on the contrary, did

aver that the title to your orators in and to said premises, being the same premises described in this bill of complaint, was prior to the said mortgage and claim of the said William Stix asserted in his said cross-petition.

And your orators further say that said Chas. A. Kebler did further allege in said last-mentioned answer filed by him, purporting to be on behalf of your orators, that the said Ellen W. Robb and Mary Robb were still living, and that said Moritz Loth had failed to pay the rental due under the said lease to him from your orators hereinbefore mentioned, falling due on Feb. 1st, 1886, and further alleging that the same was then due and unpaid, and that your orators were entitled to have the said leasehold premises sold in payment of said rental, and that they joined in the prayer of said William Stix for the appointment of a receiver and for the sale of said premises, and that your orators asked that the fee simple of said premises be sold, and that they be repaid the $10,000 due to them upon said sale, $300 due on Feb. 1st, 1886, and in-
13 terest thereon, and interest on said $10,000 from Feb. 1st, 1886, payable semi-annually, and that the said Kebler swore to said answer, professing to act as attorney of your orators, stating in the verification thereof that your orators were both absent from the State of Ohio and were non-residents thereof.

Your orator- further say that neither the said Chas. A. Kebler nor the said firm of Kebler & Roelker nor any member thereof was in any manner authorized to file said answer or any other answer in said case for them or for either of them, and that the filing of the same was wholly without authority from your orators or either of them, and that they both were at the said time non-residents of and absent from said State of Ohio and had no notice or knowledge whatever of the said answer or of the filing of the same as aforesaid.

Your orators further say that thereafter, to wit, Feb. 15th, 1887, such further proceedings were had in said cause in said court of common pleas that a decree was therein entered on the said cross-petition of the said William Stix, filed on the said 24th day of July, and that in said decree said court of common pleas found that on the 30th day of March, 1885, the said Moritz Loth, in consideration of $10,000 then loaned to him by said William Stix, executed and delivered to said William Stix the notes hereinbefore mentioned, with the agreement that should any one of said 25 $175 interest notes not be paid at maturity that said $10,000 should then become due and payable and said mortgage securing the same enforceable by foreclosure, and did further find that three of said $175
14 notes, to wit, those payable respectively at 9, 12, and 15 months after date, had not been paid and were due and unpaid, and that by reason thereof said $10,000 note had become due and payable.

And your orators further say that said decree gave judgment to said William Stix that he recover from said Moritz Loth the sum of $10,905.56, with 7 per cent. interest from the 3rd day of Jan., 1887, payable quarterly, and that the said mortgage from the

said Moritz Loth to the said William Stix hereinbefore mentioned, being the same mortgage set up in the amended and supplemental answer and cross-petition of said William Stix, filed on the said 24th day of July, was found by said decree to have been made and executed by said Loth and his said wife upon the leasehold estate and interest of the said Moritz Loth in the premises described in this bill of complaint, and that the condition of said mortgage has been broken, and that said William Stix was entitled to enforce the same for the payment of said sum therein found due him as aforesaid.

And your orators further say that by said decree it was further ordered and directed—the same purporting to be with the consent of your orators as trustees—that their fee-simple title in and to the said premises described in said mortgage to said William Stix, and being the same premises described in this bill of complaint, be sold free from the claim and title therein and thereto of your orators and all other parties to said suit, and that their respective rights in and to said premises be transferred to and reserved in the proceeds of said sale.

And your orators further say that one George Sydney Tylor was appointed by said decree special master commissioner to make said sale; and your orators further say that said decree was prepared by said Chas. A. Kebler as attorney of said William Stix, one of the defendants herein.

And your orators further say that they did not consent nor did either of them that any portion of the premises described in said decree or in this bill of complaint should be sold free from their claim and title thereto, nor did they or either of them ever consent that their said claim and title to said premises should be transferred or reserved in the proceeds of sale to be made under said decree.

And your orators further say that neither the said Chas. A. Kebler nor said firm of Kebler & Roelker nor any other person had any authority whatsoever to make or give such consent for them. Your orator- further say that such proceedings under said decree were thereafter had by said special master commissioner that the said premises described herein were by him exposed to sale at public auction pursuant to the command of an order of sale issued by the clerk of said court of common pleas under and by virtue of the decree aforesaid; that said premises were struck off and sold by him on the 16th day of April, A. D. 1887, part to the defendant August Vos and part to the defendant William Stix, and that said special master commissioner having duly reported said sale to said court the same was confirmed by said court by decree entered in said cause on the — day of ——, 1887, and the said master commissioner was ordered to and thereafter did purport to convey on the 24th day of May, 1887, said premises in fee simple and all the right, title, and interest therein of all parties to said suit to the said August Vos and William Stix as follows, viz, to Wm. Stix the following-described land, tenements, & hereditaments:

All that part of lot 2, block 12, on the plat of subdivision laid out by Gen. James Findley and J. C. & I. L. Ludlow,

recorded in Book 49, pages 420 to 422, Hamilton county records, as said block 12 is now subdivided by commissioners in partition of the estate of James and John Findlay, which fronts 50 feet on the west side of Vine St. and extending back westwardly of the same width in rear as in front 100 feet, said lot 2 having been set off by said Findlay commissioners to John Keene Findlay and conveyed by said John Keene Findlay to Moritz Loth by deed in Book 358, page 571, Hamilton county records; also all that part of lot 4 on the plat of subdivision made by Findlay commission-s in block 12 in said subdivision made by Findlay and Ludlow as fronts 50 feet on the west side of Vine street, extending back west of even width in rear as in front 100 feet, all of said lot 4 having been set off by said Findlay's commissioners to James F. Irwin and by him conveyed to said Moritz Loth by deed recorded in Deed Book 389, page 320, Hamilton county records; also the premises adjoining the easterly line of the lot last described, fronting 17 and forty-one hundredths (17 & $\frac{41}{100}$) feet on the west side of Vine street and running back of even width in rear as in front 100 feet, said 17 and $\frac{41}{100}$ feet being off the west part of lot 5 as marked by Findlay commissioners on a plat of subdivision of block 12 of Findlay & Ludlow's subdivision, said lot 5 being set off by said commissioners to Wm. Irwin, and the 17 and $\frac{41}{100}$ feet therein described being conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed recorded in Book 401, page 381, Hamilton county records.

And to the defendant August Vos the following-described land, tenements, and hereditaments: Lots marked and numbered
17 3, 4, and 5, of 20 feet front each, of the subdivision of the tract of land on the west side of Vine street north of Mulberry St. at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south of Vine street 100 feet, extending back of same width 132 feet, commencing for numbers from the south, making 5 lots of 20 feet front each, said lots 3, 4, and 5 herein described being 60 feet in front on the west side of Vine St. and being the same conveyed to said Moritz Loth by John Shelley by deed recorded in Book 401, page 382, of the Hamilton county records.

And your orators further say that on said day the said purchasers entered into possession of the same respectively and into the receipts of the rents, issues, and profits therefrom, and claim to be the owners in fee simple, and respectively deny any right, title, or interest of your orators in or to the same or any part thereof, and said Loth as well as said defendants have failed and refused to perform any of the covenants and conditions in said lease; and your orators further say that by decree of confirmation of said sale the proceeds thereof, amounting to $31,038.32, were ordered to be and were distributed to the various parties to said suit, and that in said order of distribution said decree directed that to your orators as trustee-or to Kebler, Roelker & Kelke, attorneys, there should be paid the sum of $11,361.65 by said master commissioner. Your orators further say that said special master commissioner did pay to said

Chas. A. Kebler the said sum of $11,361.65, and that he, the
18 said Kebler, embezzled and appropriated the same to his own use, and that your orators have received no part of the same; and your orators further say that they ha- no knowledge of said order of distribution, and they had no knowledge of the payment of the said sum of money to said Chas. A. Kebler, and that neither the said Chas. A. Kebler nor any other person was authorized to receive said sum of money or any part thereof, and the said order of court directing such payment was null and void.

Your orators further say that on the 23rd day of November, 1887, said Chas. A. Kebler departed this life by his own hand, and was wholly insolvent at all said times herein mentioned. Your orators further say that during all the time that said proceedings were taken in said cause in said court of common pleas they were absent from the said State of Ohio and non-residents of the said State of Ohio, as the defendant- herein well knew long prior to their pretended purchase of the premises in question, and that every step, proceeding, or act taken and done in said cause purporting to be on behalf of your orators was wholly without any authority, notice, or knowledge from or on the part of your orators or either of them, but were taken solely by fraud and mischief of the said Chas. A. Kebler, with the intention on his part at the time he did the same to thereby secure the property and money of your orators, to appropriate the same to his own use. Your orators further say that they remained in ignorance of the said suit in said court of common pleas and of all that
was done therein and of the receipt and said embezzlement
19 of the money aforesaid by said Chas. A. Kebler until after the death of said Kebler, when, upon investigation by their counsel employed by them for the purpose, they discovered the facts hereinbefore set forth.

Your orators further say that said decree of said court of common pleas of Hamilton county in said case is null and void as to your orators, and that said court was wholly without jurisdiction to order said premises sold free from the claim and title of your orators thereto, and that the said premises are still subject to all the rights of your orators as they existed at the date of the commencement of said suit, and that the purchase of the said premises by the defendants herein and conveyance thereof to them by the said George Sydney Tylor are null and void.

And your orators further say that no rent has been paid under said lease of said premises made by your orators to the said Moritz Loth, as hereinbefore alleged, since the 5th day of February, A. D. 1886, and there is due under the terms of said lease as rent of said premises the rent falling due since then, being at the rate of $600 per annum, and that the amount of said rent due and unpaid under the terms of said lease since said date is, with interest thereon, a lien in favor of your orators upon said leasehold estate of the said Moritz Loth in said premises prior to any right acquired therein or thereto by the said defendants herein or either of them; and your orators further say that said Moritz Loth is wholly insolvent.

And your orators further say that they will file as exhibits to this

their bill of complaint a copy of the records in said suit, or so much thereof as pertains to the premises in question, and of the several and respective deeds and conveyances herein referred to, the
20 same marked Exhibits A, B, C, D, and E respectively, and ask that they be taken as part of this bill.

Wherefore, the premises considered and for remedy thereof, inasmuch as your orators are without adequate remedy at law, they pray that your honors will order, adjudge, and decree that the said judgment of said court of common pleas of Hamilton county, Ohio, in said case ordering said premises sold free of the claim and title aforesaid of your orators is and was null and void and of no effect; and, further, that the said sale to said defendants of said premises, made on the 16th day of April, 1887, in pursuance of such order, and also that the said several deeds from the said special master commissioner, George Sydney Tylor, dated May 24, 1887, one being to said August Vos and the other to the said William Stix, made in pursuance of said sale and said confirmation thereof and recorded respectively in Deed Book 630, page 586, of the records of Hamilton county, Ohio, and the other in Deed Book 635, page 45, of Hamilton county, Ohio, records (the first being the deed to said Stix and the latter being the deed to said Vos), be held and declared null and void as against your orator, and that the same be set aside and held for naught as against them, and that the said August Vos and said William Stix be perpetually enjoined from asserting any claim or title to said premises or any part thereof by virtue of said sale and of said deeds to them, adverse to the title, rights, or interests of your orators thereto as herein set forth, and that your orators be restored to all rights in and to said premises they had or were entitled to have on said 13th day of November, 1885, by virtue of their ownership thereof in fee simply as trustees aforesaid and by virtue of the execution and delivery of said lease, and that the incumbrances and cloud upon their said title,
21 rights, and interests created by said sale and by said conveyances in pursuance of said sale and by said claims of the said defendants be removed, and that your orators be declared to be the sole owners in fee simple of all the said premises as trustees, subject, however, to the said lease from them to the said Moritz Loth hereinbefore mentioned, and that the said lease be held and declared to be in full force and effect and binding on the defendants herein as assignees of said Loth.

And your orators further pray that the amount of rent accrued under the terms of said lease and in arrears and unpaid, with interest thereon, be ascertained by order of this court, and that your orators be declared and adjudged to have a lien therefor upon the said estate of leasehold by virtue of the provisions of said lease prior to the claim or claims of all other persons whatsoever, and that said leasehold estate be sold to satisfy the lien aforesaid, and that the proceeds of said sales be applied first to the payment of that portion of said rent and interest thereon which accrued prior to the 24th day of May, 1887, and that the defendants be decreed to pay to your orators all the rent that has accrued under said lease

since said 24th day of May, 1887, or to pay such part thereof remaining unsatisfied after the application of the proceeds of said sale in the manner herein asked for.

And your orators further pray that in the meantime a receiver be appointed to rent said premises or to collect the rent thereof from the occupants of the same and to receive and apply the money so arising to the payment of rent to your orator- under said lease, applying the same in the manner hereinbefore asked for and to hold any surplus to abide the order of this court.

And your orators further pray that it be ordered, adjudged,
22 and decreed that said defendant-, August Vos and William Stix, perform the covenants of said lease as to insuring the improvements upon parts thereof purchased by each respectively as aforesaid, and that they be required respectively to have the same insured forthwith at their expense, according to the terms of said lease, in a sum not less than $5,000 in one or more solvent and reputable insurance companies, to be approved by your orators, and that they be required to keep the same so insured during the term of said lease, and for all other relief your orators will be entitled to in equity and good conscience.

May it please your honors to *to* grant unto your orators a writ of subpœna of the United States of America to be directed to the said August Vos and to the said William Stix and to said Mority Loth, thereby commanding them and each of them, at a certain date and under certain pain therein to be specified, personally to appear before your honors and this honorable court, and then and there to answer all and singular the premises and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orators shall ever pray.

HARMON, COLSTON, GOLDSMITH & HOADLY, *Solicitors for Complainants.*

EDWARD COLSTON, *Of Counsel.*

23 And afterwards, to wit, on the same day, to wit, the following subpœna in chancery was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Subpœna in Chancery.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon August Vos, citizen of and resident in the State of Kentucky; William Stix, a citizen of and resident in the State of Missouri, and Moritz Loth, a citizen of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the

southern district of Ohio aforesaid, at Cincinnati, on the first Monday in August next, to answer a certain bill in chancery filed and exhibited in said court against them by James Hampden Robb and Charles E. Strong, citizens of and residents of the State of New York.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Samuel F. Miller, associate justice of the United States, this 31st day of May, A. D. 1888, and in the 112th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.* [SEAL.]

24 *Memorandum.*

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of July, 1888; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

And afterwards, to wit, on the 4th day of June, A. D. 1888, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Edward Colston.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Hamilton County, }

Affidavit.

Edward Colston, being duly sworn, says *the* is one of the solicitors of the complainant in the above-entitled suit, and that one of the above-named defendants, namely, William Stix, is not a resident or inhabitant of the southern district of Ohio and cannot be found therein, and that service of subpœna cannot be made upon him in this case in this district, but, on the contrary, affiant says that the said William Stix is an inhabitant and resident of the State of Missouri and city of St. Louis, and that this cause is one of those mentioned in section 738 of the Revised Statutes of the United States.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence this 4th day of June, A. D. 1888.

ROB'T C. GEORGI,
Dep. Cl'k, U. S. Cir. C't, S. D. O. [SEAL.]

25 And afterwards, to wit, on the 4th day of June, A. D. 1888, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and CHAS. E. STRONG, Trustees, Complainants,
vs.
AUGUST VOS, WILLIAM STIX, & MORITZ LOTH, Defendants.

I hereby acknowledge myself security for costs in this case.
W. B. SMITH. [SEAL.]

Taken and acknowledged before me this — day of ——, 1888.

——, ——,
Clerk U. S. — Court, S. D. O.

26 SOUTHERN DISTRICT OF OHIO, *ss:*

I, —— ——, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth — dollars in real estate within the jurisdiction of this court and subject to execution levy and sale.

—— ——.

Sworn to and subscribed before me this — day of ——, A. D. 188–.

——, ——,
Clerk U. S. — Court, S. D. O.

(Endorsed:) W. B. S.: Please sign the above cost bond where indicated by cross and return same to the undersigned by mail and we will see you harmless. —— ——.

And afterwards, to wit, on the 4th day of June, A. D. 1888, came the marshal of the district to whom the aforesaid subpœna was in form directed and returned the same into the clerk's office of said court with hi*m* proceedings endorsed thereon in the words and figures following, to wit:

Marshal's Return.

27 Received this writ at Cincinnati, Ohio, on the 31st day of May, 1888, and on the same day, at said Cincinnati, Ohio, I served the within-named August Vos by handing to him personally a true copy thereof, having all the endorsements thereon, and on the 2nd day of June, 1888, I served the within *the within* named Moritz Loth with a true copy hereof, having all the endorsements thereon, left at his place of residence in Cincinnati, Ohio, with an adult member of his family, his daughter; the within-named

William Stix not found in my district, and as to him this writ is returned not found.

Fees, total, $5.62.

H. C. URNER,
U. S. Marshal,
By J. KIERSTED, *Deputy,*

And afterwards, to wit, on the same day, to wit, the 4th day of June, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 19.

It being made to appear to the satisfaction of the court, by the affidavit of Edward Colston, one of the solicitors for the complainants herein, that William Stix, one of the defendants in this cause, is not an inhabitant or resident of the southern district of Ohio, but that he is an inhabitant and resident of the city of St. Louis and State of Missouri, and that he has not been found in said district, as also appears by the return of the marshall in this court upon the subpœna issued in this case for the said William Stix, and not having appeared in this cause, the said William Stix is hereby
28 directed to appear, plead, answer, or demur on or before *or before* the first Monday of August, A. D. 1888, to wit, the sixth day thereof, to the bill of complaint of the said James Hampden Robb and Chas. E. Strong, trustees, complainants herein; and it is further ordered that the United States marshall for the eastern district of Missouri make service of a copy of this order upon the said William Stix personally or at his usual place of residence and make return thereof to this court, duly verified by affidavit.

And afterwards, to wit, -n the 4th day of June, A. D. 1888, there was issued out of the clerk's office of said court the following certified copy of entry directed to the marshal of eastern division of the eastern judicial district of Missouri; said entry is clothed in the words and figures following, to wit:

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the 6th judicial circuit of the United States, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of April, being the third day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth.

Present: The Honorable George R. Sage, district judge.

On Monday, the fourth day of June, 1888, among the proceedings had were the following, to wit:

29 JAMES HAMPDEN ROBB *et al.*, Trustees,
vs.
AUGUST VOS *et al.*, Defendants.

It being made to appear to the satisfaction of the court by the affidavit of Edward Colston, one of the solicitors for the complainants herein, that William Stix, one of the defendants in this cause, is not an inhabitant or resident of the southern district of Ohio, but that he is an inhabitant and resident of the city of St. Louis and State of Missouri, and that he has not been found in said district, as also appears by the return of the marshal in this court upon the subpœna issued in this case for the said William Stix, and not having appeared in this cause, the said William Stix is hereby directed to appear, plead, answer, or demur on or before the first Monday of August, A. D. 1888, to wit, the sixth day thereof, to the bill of complaint of the said James Hampden Robb and Chas. E. Strong, trustees, complainants herein; and it is further ordered that the United States marshal for the eastern district of Missouri make service of a copy of this order upon the said William Stix personally or at his usual place of residence and make return thereof to this court, duly verified by affidavit.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division*, } *ss*:

I, Benjamin R. Cowen, clerk of the circuit court of the
30 United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 5th day of May, A. D. 1888.

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*. [SEAL.]

And afterwards, to wit, on the 5th day of June, A. D. 1888, the following Exhibits A, B, C, D, & E *was* filed in the clerk's office of said court, clothed in the words and figures following, to wit:

EXHIBITS A, B, C, D, E.

EXHIBIT A.

31 State of Ohio, County of Hamilton, Court of Common Pleas.

MEYER GUGENHEIM, Plaintiff,
vs.
MORITZ LOTH and FREDERIKA LOTH, His Wife; ADOLPH FEISE, William Stix, The National Park Bank of New York, a Corporation Duly Created under the Laws of the United States; Burnhard Bettmann, Abraham J. Freidlander, Ricka Amberg, The First National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; Elijah Newman, Otto Joffe and Frederick S. Pinkus, Partners as O. Joffe and Pinkus; J. D. Hearne, The Third National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; The Commercial Bank of Cincinnati, a Corporation Duly Created under the Laws of Ohio; James Hampden Robb and Charles E. Strong, Trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Adler, Louis Adler, Philip Stromberg, Abraham Reeser, August Vos, and George A. Clark, Defendants.

Petition.

The plaintiff states that by the consideration of this court he recovered a judgment against the defendant Moritz Loth on October 23, 1885, for the sum of twenty-five hundred and forty-seven and $\frac{5}{100}$ *cents* ($2,547.05), with interest from October 23, 1885, and $——, costs, which judgment became on said day a valid lien upon the real estate belonging to the defendant hereinafter described.

That on the 6th day of November, 1885, an execution was
32 issued up- said judgment to the sheriff of Hamilton county, and by him on said day duly levied upon said real estate, on goods and chattels being found by him whereon to levy.

That said judgment remains unreversed, wholly unpaid, and is in full force and effect; that the defendant has no goods or chattels subject to execution, and that there are liens upon said real estate of various kinds.

That the said defendant Moritz Loth has certain equities in said property after satisfying all valid liens; that the plaintiff's said judgment is a valid and subsisting lien upon all of said property; that the following-described premises were conveyed by said defendant Moritz Loth to the defendant J. D. Hearne on the 12th day of January, 1886, by deeds absolute on their face, but the plaintiff says that said deeds were only intended between said parties by way of mortgage and as security for a certain debt owing by said defendant Moritz Loth to said defendants J. D. Hearne and The Third National Bank of Cincinnati, the amount of which is unknown to the plaintiff, a full description of which property is as follows, to wit:

A. The following-described real estate, viz., situated in Hamilton county and State of Ohio, to wit, lot number 11, in Sheriff's subdivision of lots number- 8, 14, and 20, in section 14, town. 3, 2nd fractional range, as laid down on plat of subdivision made by commissioners in partition among the heirs of Andres McMillan. For a more particular description of said lot number 11 see plat recorded in Plat Book No. 3, page 240, Hamilton county records, being the same premises conveyed to said Moritz Loth by deed recorded in Book 406, page 326, Hamilton county records.

B. The following-described real estate, situated in Hamil-
33 ton county and State of Ohio, to wit, lots 14, 15, 16, 17, and 18, in Sheriff's subdivision of lots Nos. 8, 14, and 20, in section 14, town. 3, and fractional range, as laid down on a plat of subdivision made by commissioners in partition among the heirs of Andrew McMillen, deceased. For a more particular description of said lots 14, 15, 16, 17, and 18 see plat recorded in Plat Book No. 3, page 246, Hamilton county records, being the same premises conveyed to said Moritz Loth by deed recorded in Book 390, page 628, Hamilton county records.

C. The following-described real estate, viz., all of lots 85, 86, 87, 88, 89, 90, 91, and 92, in a subdivision made by the commissioners in case No. — to make partition among the heirs of Jane and James Findlay, deceased, of block 11 of Findlay and Ludlow's subdivision; lots Nos. 85 to 91, inclusive, fronting each 50 feet on the easterly side of Fox street and extending east 90 feet, more or less, to a 15-foot alley; lot No. 92 having a front of 40 feet, more or less, on the east side of Fox street and extending east 90 feet, more or less, to the alley; the above premises being part of the same premises conveyed to said Moritz Loth by deed recorded in Book 393, page 143, Hamilton county records.

D. The following-described real estate, to wit, all that certain lot of ground fronting 40 feet on the Cincinnati and Lebanon turnpike north of and near the city of Cincinnati and measuring back west to the width of 20 feet at the section line a distance of about 126¾ feet, more or less, for boundary commencing at the northeast corner of a lot conveyed to Jonathan Hampden by Samuel Beresford and wife by deed recorded in Book No. 316 of the Hamilton county records, thence running west with the north line of said lot
126¾ feet to the section line, thence south with the section
34 20 feet, thence east to the turnpike road, and thence 40 feet north with the east line of the road to the place of beginning.

Also all that certain lot or parcel of land, part of the 7th section, in the 3rd township and 2nd fractional range of township, in the Miami purchase in Hamilton county, Ohio, in the southwest quarter of said section, beginning on the west side of the Lebanon turnpike road, in the south line of a tract of land formerly owned by William Morris, deceased, and the northeast corner of a lot owned by Anthony Hare, thence running with the north line of the said Anthony Hare's lot nearly or quite due west 126½ feet, mor- or less, to the section line, thence with the section line north 40 feet, thence eastwardly with the land of said William Morris, deceased, 135 feet,

more or less, to the west side of the Lebanon turnpike aforesaid, thence southwardly with said turnpike road 20 feet to the place of beginning, reserving, however, for public use, a street or alley 20 feet in width off the west end of said lot or parcel of land, to run along the east of said section line; both of the above-described premises being the same premises conveyed to the said Moritz Loth by deed recorded in Book 358, page 564, of the records of Hamilton county.

E. The following-described real estate, viz., lot number 7, in plat marked "A," now on file with papers in case 15688 of superior court of Cincinnati among the heirs of J. Kaufmann, deceased, in section 7, township 3, fractional range 2, of the Miami purchase, said lot 7 fronting 50 feet on the north side of the Lebanon pike and extending back same width to the section line, being part of the premises conveyed to the said Moritz Loth by deed recorded in Boom 358, page 562, of the records of Hamilton county.

35 F. All those certain lots of land in Cincinnati, Hamilton county, Ohio, numbers 13, 14, 15, 16, 17, 18, 20, 21, 32, 38, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 69, on the plat of Elsas and Loth subdivision of part of block 14 of Findlay's estate, as recorded in Plat Book 3, page 184, of the records of Hamilton county, Ohio.

G. All the following-described real estate, viz., all of lots 9, 10, 11, and 12, on Price's subdivision of lots on Prospect hill, north of Cincinnati, now within the city limits, situated on the east side of Price street, north of Liberty street and parallel therewith, fronting on said Price street, in all 100 feet, extending for depth eastwardly at right angles therewith and between parallel lines to section street, being same premises conveyed to said Moritz Loth by deed recorded in Booms 358, page 566, Hamilton county records.

H. All that real estate situated in the city of Cincinnati, Hamilton county, Ohio, marked and numbered as lots Nos. 13 and 14, in Price's 1st subdivision, in said city of Cincinnati, and lying on the east side of Price street, being each 25 feet in front on the east side of Price street and extending east between parallel lines 153 feet, more or less, to an extended street to be laid out along the section line, being the same premises conveyed to said Moritz Loth by deed recorded in Books 395, page 279, Hamilton county records.

I. The following real estate, to wit, situated in the city of Cincinnati, county of Hamilton, and State of Ohio, viz., these two lots situate on the east side of Price street which are marked and numbered on the plat of Phillip M. Price's subdivision as lots 15

36 and 16, each fronting 25 feet on said Price street and running back 140 feet, more or less, being the same premises conveyed to said Moritz Loth by deed recorded in Book 362, page 525, Hamilton county records.

J. The following-described real estate, viz., all those two certain lots of ground situate in the county of Hamilton and State of Ohio and known as lots numbered 9 and 10, in C. K. Smith's subdivision, as recorded in Book No. 1, page 208, Hamilton county records, and being each 24 feet in front on the west side of the Deer Creek

road and running back westwardly, the same width in rear as in front, 93 feet, more or less, and being the same premises conveyed to the said Moritz Loth by deed recorded in Books 387, page 333, Hamilton county records.

K. The following-described real estate, viz., all that certain lot or parcel of ground known as lot number 12, in C. K. Smith's subdivision, as recorded in Book No. 1, page 208, Hamilton county records, said lots fronting 24 feet on the westerly side of Hunt St., or the Reading road, and extending back westwardly between parallel lines 150 feet, more or less, being the same premises conveyed to said Moritz Loth by deed recorded in Book 387, page 332, Hamilton county records.

L. The following-described real estate, viz., all that certain lot or parcel of ground known as lot No. 17, in C. K. Smith's subdivision, as recorded in Book No. 1, page 208, Hamilton county records, said lot fronting 25 feet on the west side of Deer Creek road and extending back westwardly 110 feet, more or less, and being in the city of Cincinnati, Hamilton county, and State of Ohio, and being the same premises conveyed to the said Moritz Loth be deed
37 recorded in Book 387, page 104, Hamilton county records.

M. The following-described real estate, viz., a lot of ground fronting 100 feet on the east side of Loth street, being about 430 feet north of Evans alley, and lying between lots 47 and 92, in Elsas and Loth's subdivision.

The following-described premises were conveyed by said defendant Moritz Loth to the defendants Berthe Mann and Fannia Mann on the — day of ——, 1885, by deed absolute on its face, but the plaintiff says that said deed was only intended between said parties by way of mortgage and as security for a debt owing by said defendant Moritz Loth to said defendants Bertha Mann and Fannia Mann, the amount of which is unknown to the plaintiff, a full description of which property is as follows, to wit:

All that lot in the city of Cincinnati, Hamilton county, Ohio, on the south side of McMillan street, commencing 68 feet east from the corner of Vine street, thence at right angles with McMillan street south 100 feet, thence east parallel with McMillan street 64 feet, thence north 100 feet to McMillan street, thence west along the south side of McMillan street 64 feet to place of beginning, being 12 feet off the northeasterly end of block I and 32 feet off the west end of block G, in J. F. Wright's subdivision of lots on Vine-street hill, in the city of Cincinnati, Hamilton county, Ohio, in section 13, recorded in Plat Book 1, page 185, Hamilton county records, being the same premises conveyed to said Moritz Loth by and recorded in Book 358, page 568.

38 That the following-described premises were conveyed by said defendant Moritz Loth to the defendant The Commercial Bank of Cincinnati on the 29th day of December, 1884, by deeds absolute on their face and recorded June 4th, 1885, but the plaintiff says that said deeds were only intended between said parties by way of mortgage and as security for a certain debt owing by said defendant Moritz Loth to said defendant The Commercial Bank of

Cincinnati, the amount of which is unknown to the plaintiff, a full description of which property is as follows, to wit:

A. The following-described real estate, viz., lots number 2, 3, 4, 5, 6, 7, 8, and 9, in Elsas and Loth's subdivision, in the east side of Vine street north of Mulberry street, in the city of Cincinnati, the same being 185 feet in front and running back eastwardly to east alley.

B. The following-described real estate, being part of block 16, in Findlay and Ludlow's subdivision, in the city of Cincinnati, Hamilton county, Ohio, and described as follows: Beginning at a point on the west side of Vine street south of Mills St., running thence southwardly along the west side of Vine street 300 feet, thence westwardly at right angles to Vine street 80 feet, thence northwardly parallel with Vine St. 300 feet, thence eastwardly 80 feet to the place of beginning; also the following-described real estate on said subdivision: Beginning at a point on the east line of Van Lear street 150 feet west of Vine street, running thence southwardly along the east line of Van Lear street 300 feet to a point, thence eastwardly at right angles with Van Lear street 70 feet, thence northwardly along
39 the west line of the lot hereinbefore described 300 feet to a point, thence 70 feet to the place of beginning.

That the following-described premises were conveyed by said defendant Moritz Loth to the defendant George A. Clark on the 16th day of September, 1885, by deed absolute on its face, but the plaintiff says that said deeds were only intended between said parties by way of mortgage and as security for a certain debt owing by said defendant Moritz Loth to said defendant George A. Clark, the amount of which is unknown to the plaintiff, a full description of which property is as follows, to wit:

The following-described real estate, situate in the city of Cincinnati, Hamilton county, Ohio: Beginning in the west line of section 7, town. 3, fractional range 2, Miami purchase, at its intersection with the northerly line of the lot sold by Anthony Hare to M. Loth by deed recorded in Book 358, page 564, Hamilton Co. records, thence easterly with the north line of said lot 35 feet, more or less, to the southwesterly corner of the lot sold by said M. Loth to the city of Cincinnati by deed recorded in Book 360, page 537, of the records aforesaid; thence northerly with the west line of said lot parallel with the Lebanon turnpike road 100 feet to the southerly line of the lot leased by said Loth to the city of Cincinnati by lease recorded in Lease Book 38, page 321, of the records aforesaid; thence westerly with said line to said west line of section 7 aforesaid, and thence south with said section line to the place of beginning.

That the following-described premises were conveyed by said defendant Moritz Loth to the defendants Henry Adler and Louis
40 Adler on the 14th day of September, 1885, by deed absolute on its face, but the plaintiff says that said deed was only intended between said parties by way of mortgage and as security for a certain debt owing by said defendant Moritz Loth to said defendants Henry Adler and Louis Adler, the amount of which is unknown

to the plaintiff, a full description of which property is as follows, to wit:

The following-described real estate, situate in the city of Cincinnati, in the county of Hamilton and State of Ohio, viz., the north half of a lot numbered 74, in a subdivision made by commissioners appointed to make partition among the heirs of Jane and James Findlay of lot number 11 of Findlay and Ludlow's subdivision, the property hereby conveyed being 25 feet in front on the west side of Rice street and extending back westwardly between parallel lines to an alley.

That the following-described premises were conveyed by said defendant Moritz Loth to the defendant Philip Stronberg on the 20th day of January, 1885, by deed absolute on its face, but the plaintiff says that said deed was only intended between said parties by way of mortgage and as security for a certain debt owing by said defendant Moritz Loth to said defendant Philip Stronberg, the amount of which is unknown to the plaintiff, a full description of which property is as follows, to wit:

The following-described real estate, in the city of Cincinnati, Hamilton county, Ohio: On the west side of Vine street north of Mulberry street, being 15 feet in width by 100 feet in depth, being 177 feet north of square 12 and a part of lot 13, in the subdivision made by Findlay's commissioners.

Also the following-described leasehold estate, viz: Lots Nos. 11 and 12, in Elsas and Loth's subdivision, being 50 feet on the
41 east side of Vine street north of Mulberry street and extending back eastwardly 90 feet, more or less, to an alley; also the following-described leasehold estate: Beginning at the northeast corner of lot No. 27, in said Elsas and Loth's subdivision, on the west side of Loth street north of Mulberry street, running thence southwardly along the west line of said Loth street 45 feet; thence westwardly parallel with the north line of said lot 82 feet, more or less, to an alley; thence northwardly along the east line of said alley 45 feet to the northwest corner of said lot; thence along the north line thereof eastwardly to the place of beginning.

Also the following-described leasehold estate, in said Elsas and Loth's subdivision, in the west side of said Loth street: Beginning at the southeast corner of lot No. 29, thence northwardly along the west side of said Loth street 30 feet; thence westwardly on a line parallel with the north line of said lot No. 27 eighty-two feet, more or less, to an alley; thence southwardly along the east side of said alley 30 feet to the southwest corner of said lot No. 29; thence eastwardly along the south line of said lot to the place of beginning.

That the following-described premises were conveyed by said defendant Moritz Loth to the defendant Abraham Reeser on the 14th day of September, 1885, by deeds absolute on their face, but the plaintiff says that said deeds were only intended between said parties by way of mortgage and as security for a certain debt owing by said defendant Moritz Loth to said defendant Abraham Reeser, the amount of which is unknown to the plaintiff, a full description of which property is as follows, to wit:

A. The following-described real estate, situated in the city of Cincinnati, in the county of Hamilton and State of Ohio: The
42 nor-h half of lot num-ered 94, in a subdivision of lots made by commissioners appointed to make partition among the heirs of Jane and James Findlay of block No. 11 of Findlay and Ludlow's subdivision, the property hereby conveyed being 25 feet in front on the west side of Loth street and extending back westwardly between parallel lines 90 feet, more or less, to an alley.

B. The following-described premises, situated in the city of Cincinnati, in the county of Hamilton and State of Ohio: The south half of lot No. 74, in a subdivision made by commissioners appointed to make partition among the heirs of Jane and James Findlay of lot number 11 of Findlay and Ludlow's subdivision, the said property being 25 feet in front on the west side of Rice street and extending back westwardly between parallel lines to an alley.

That the following-described premises were conveyed by said defendant Moritz Loth to the defendant August Vos on the 15th day of January, 1885, by deed absolute on its face, but the plaintiff says that said deed was only intended between said parties by way of mortgage and as security for a certain debt owing by said defendant Moritz Loth to said defendant August Vos, the amount of which is unknown to the plaintiff, a full description of which property is as follows, to wit:

The following-described real estate, in the city of Cincinnati, Hamilton Co., Ohio, to wit: The south half of lot number 94, the north half of lot number 95, and the north half of lot number 96, all in square 11 of subdivision of lots made among the heirs of *of* James and Jane Findlay, each of said half lots being 25 feet in front on the west side of Loth street north of Mulberry St.
43 and extending back westwardly between parallel lines 90 feet, more or less, to an alley.

Also the following-described real estate, in Elsas and Loth's subdivision, on the west side of said Loth street north of Mulberry street: Lots numbered 39 and 40, each of said lots being 25 feet in front and extending back westwardly between parallel lines 82 feet, more or less, to an alley.

Plaintiff further says that the following is a description of real estate in Hamilton Co. belonging to the defendant Moritz Loth and the title to which is in *lien*, upon which the plaintiff's judgment is a lien, viz:

I. The following-described real estate, viz: All that certain lot of ground known and designated as lot No. 642 on a plat of subdivision made by commissioners appointed to make partition among the heirs of William Barr, deceased, which said plat is recorded in Book No. 109, page- 358 to 366 (and marked plat B), of the records of Hamilton county, Ohio, said lot being in the western part of the city of Cincinnati, county and State aforesaid, and being 25 feet in front on the north side of Barr street between Mound and Cutter streets, and extends back at right angles to Barr street same width in rear as in front, 65 feet.

Also all that lot or parcel of land situated in the city of Cincin-

nati and State aforesaid and known as lot No. 643 in the plat of the Barr estate, which said plat is recorded in Book No. 91, page 396, of the records of Hamilton county, Ohio, said lot 643 being 25 feet in front on the north side of Barr street and extending same width in rear as in front towards 7th street 65 feet, and being the same premises conveyed to said Moritz Loth by deed recorded in Book 294, page 427, Hamilton county records.

II. The following-described real estate, situate in Cincinnati, Hamilton county, Ohio, viz: A lot beginning at the southeast corner of Vine and McMillan streets, thence running east on McMillan street 68 feet, more or less; thence south at right angles 80.19 feet, more or less; thence westwardly at right angles to Vine street 100 feet, more or less, *to Vine street;* thence northerly on Vine street thirty feet to the place of beginning, being the north part of block 1 of John F. Wright's subdivision.

III. The following-described real estate, viz: All that lot of ground on the easterly side of Vine street, in the city of Cincinnati, Hamilton county, Ohio, commencing at a point in the easterly side of Vine street 119 feet south of McMillan street, thence southwardly along the east side of Vine street 90 feet; thence southeastwardly in a line at right angles with Vine street 100 feet; thence northwardly in a line parallel with Vine street 100 feet, removed therefrom 90 feet; thence northeastwardly to Vine street, to the place of beginning, being 90 feet front by 100 feet deep, in block 1 of J. F. Wright's subdivision, on Vine St. hill, as recorded in Plat Book No. 1, page 185, Hamilton county records, being the same premises conveyed to the said Moritz Loth by deed recorded in Book 358, page 569, of Hamilton county records.

IV. The following-described real estate, viz: A lot of land on the east side of Vine street, commencing 209 feet south from the corner of McMillan street, thence eastwardly at right angles from Vine St. 100 feet; thence south*south*wardly in a line parallel with Vine street twenty feet, more or less, to Evans and Swift's line; thence along the north line of Evans and Swift's land to the easterly line of Vine St.; thence northerly along the easterly line of
45 Vine street *thence northerly along the easterly line of Vine St.* 75 feet, more or less, to the place of beginning, being the southerly end of block 1, in J. F. Wright's subdivision, on Vine street hill.

V. The following-described real estate, in the city of Cincinnati, viz: The south 25 feet of lot 96, the whole of lot 97, and the north 35 feet of lot 98, on the westerly side of Fox street near Loth St., in a subdivision of lots, among the heirs of James and Jane Findlay, of block 11 of Findlay and Ludlow's subdivision, the real estate above described fronting 109 feet on the westerly side of Loth street and running back of even width in rear as in front to the westerly line of said lots and being part of the same premises conveyed to said Morits Loth by deed recorded in Deed Book 401, page 387, Hamilton county records.

VI. The following-described leasehold estate, in city of Cincinnati, county of Hamilton and State of Ohio, on the westerly side of

Vine street north of Mulberry street, viz: Lots marked and numbered 3, 4, and 5, of 20 feet front each, of the subdivision of the tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet and extending back westwardly of same width 132 feet, commencing for numbers from the south, making five lots of 20 feet front each, said lots 3, 4, and 5 herein described having 60 feet in front on the west side of Vine street, and were conveyed to said Moritz Loth by deed recorded in Book 401, page 382, Hamilton county records.

46 VII. The following-described real estate, viz: All that part of block 12 which was laid out by General James Findlay, James C. and J. L. Ludlow, and recorded in Book 49, pages 420, 421, and 422, in the records of Hamilton county, being lot numbered two, in said block 12, as now subdivided by the commissioners in case of partition of James and Jane Findlay's estates, description as follows, viz: Fronting 50 feet on the west side of Vine St. and extending westwardly to Washington street 300 feet, more or less, and being the same premises conveyed to said Moritz Loth by deed recorded in Book 358, page 571, of the records of Hamilton county.

VIII. The following real estate, viz: All that certain lot of ground situated on the west side of Vine street, in the city of Cincinnati, Hamilton county, State of Ohio, and known and designated as lot number 4, in block 12, on a plat made by Findlay's commissioners, said lot being 50 feet in front on said west side of Vine street and extending back westwardly 250 feet, more or less, to Cliff street, and being the same premises conveyed to the said Moritz Loth by deed recorded in Deed Book 389, page 320, of Hamilton county records.

IX. The following real estate, viz: Lot No. 5 and 10 feet off of lot No. 4 in a subdivision of a tract of land in the city of Cincinnati beginning on the west side of Vine street between land formerly owned by E. B. Reeder and land of the heirs of Findlay, making 30 feet in front, running south on Vine street and extending back westwardly 132 feet. For a more particular description reference is made to the plat of E. B. Reeder, recorded in Book 64, page 67, of the records of Hamilton county, and being the same premises conveyed to said Moritz Loth by deed recorded in Book 401, page 381, of Hamilton county records.

47 X. The following real estate, viz., being lot 6 of block 12 of Findlay and Ludlow's subdivision as now subdivided by commissioners in case of partition of James and Jane Findlay's estate, described as follows, viz: Fronting 50 feet on west side of Vine St. and extending westward to Washington street 300 feet, more or less, and being same premises conveyed to said Moritz Loth by deed recorded in Book 358, page 572, Hamilton county records.

XI. The following-described real estate, being all that portion of lot No. 7, in block 12, Findlay and Ludlow's subdivision, being about 16 feet wide on Washington street, bounded northwardly by property of N. Longworth, deceased, eastwardly by Greeve and the lot conveyed by Rankin to Loth, and southwardly by lot No. 6 of said block 12, and westwardly, also, by a lot conveyed by Rankin

to Loth, and being the same premises conveyed to the said Moritz Loth by deed recorded in Book 393, page 145, Hamilton county records.

Also the following-described real estate, in Cincinnati, Hamilton county, Ohio, to wit: A part of lot No. 7 on a plat of partition of block 12 of Findlay and Ludlow's plat, which plat of partition was made by the commissioners appointed to partition the estate of James and Jane Findlay, deceased, and is recorded in volume 22, page 2373, of the Common Pleas Records of said county, said part of lot No. 7 hereby conveyed fronting 44 feet, more or less, on west side of Vine street by 90 feet deep, being all the space between the southerly line of lot No. 6 on said plat of subdivision, said lot hereby conveyed being narrower in the rear than in front.

Also another part of said lot No. 7 on the plat of subdivision of said block 12 of Findlay and Ludlow's plat, fronting 50 feet
48 on the easterly side of Washington street, commencing at the southwesterly corner of said lot No. 7, thence northerly with the line of said Washington street 50 feet, thence eastwardly in a line parallel with the southerly line of said lot No. 7 ninety feet, and bounded southerly by the southerly line of said lot No. 7, of even width in rear as in front, and of the depth of 90 feet, the latter two of the above-described parcels of land being the same premises conveyed to the said Moritz Loth by deed recorded in Book 393, page 146, of Hamilton county records.

The plaintiff further says that the following-named defendants, Frederick Loth, Adolph Feiss, William Stix, The National Park Bank of New York, a corporation duly created under the laws of the United States; Bernhard Bettmann, Abraham J. Friedlander, Ricka Amberg, The First National Bank of Cincinnati, a corporation duly created under the laws of the United States; Elijah Newman, Otto Jaffe and Frederick S. Pinkus, partners as O. Jaffe and Pinkus; J. D. Hearne, The Third National Bank of Cincinnati, a corporation duly created under the laws of the United States; The Commercial Bank of Cincinnati, a corporation duly created under the laws of Ohio; James Hampden Robb and Charles E. Strong, trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Auler, Louis Auler, Philip Stromberg, Abraham Reeser, August Vos, and George A. Clark, have or claim some lien upon or interest in the foregoing-described premises or some partition thereof, and are, therefore, necessary parties hereto, and he asks that they each be required to answer, setting up any right, claim, lien, or interest they may have; the plaintiff further states that the defendant Moritz Loth refuses to apply said property or his equities therein in satisfaction of said judgment, and that he is collecting the rents and income of all of said property and refuses to apply the
49 same in satisfaction of said judgment, and that it is necessary, in order to carry said judgment in effect, to have a receiver appointed by the court to take charge thereof and collect the income and rents therefrom, and that said property or the said defendant Moritz Loth's interest and equities therein is probably insufficient to discharge or satisfy all of said judgment, and that it

is necessary to have a receiver appointed for all of said property to aid in the execution of said judgment.

The plaintiff annexes hereto interrogatories to be answered by the defendants J. D. Hearne, The Third National Bank of Cincinnati, The Commercial Bank of Cincinnati, James Hampden Robb and Charles E. Strong, trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Adler, Louis Adler, Philip Stromberg, Abraham Reeser, August Vos, and George A. Clark.

Wherefore the plaintiff prays that said deeds to the defendants J. D. Hearne, Commercial Bank of Cincinnati, James Hampden Robb and Charles E. Strong, trustees; Henry W. Taylor, Bertha Mann, Henry Adler, Louis Adler, Philip Frondorf, Abraham Reeser, August Vos, and George A. Clark be declared and decreed by the court to be mortgages; that the same be set aside and held only to be securities; that a receiver be appointed to take charge and control all of said property, collect the rents and income thereof, and that the liens thereon be marshaled and the priorities thereof determined, and that the court will order a sale of all of said property to satisfy said judgment, and for all other and proper relief that he may entitled to in the premises.

LONG, AVERY, KRAMER & KRAMER,
Attorneys for Plaintiff.

50 STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss:

Meyer Guggenheim, the plaintiff, makes oath and says that he believes the facts and allegations of the foregoing petition to be true.

MEYER GUGGENHEIM.

Sworn to before me and subscribed in my presence this tenth day of November, 1885.

JOHN L. KELLY,
Notary Public, Philadelphia County, Penna. [SEAL.]

Interrogatories to be answered by the defendants J. D. Hearne, Commercial Bank of Cincinnati, James Hampden Robb and Charles E. Strong, trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Adler, Louis Adler, Philip Stromberg, Abraham Reeser, August Vos, and George A. Clark.

First interrogatory. What sum or sums of money did you pay as a consideration for the conveyance by the defendant Moritz Loth to you of the premises described in the foregoing petition, and to whom?

Second interrogatory. What indebtedness existed at the time of such conveyance by the defendant Moritz Loth in reference to said property or said conveyances therefor?

Third interrogatory. What contract, verbal or written, if any, exists between you and the defendant Moritz Loth in reference to said property or said conveyances therefor?

Fourth interrogatory. Have you made any *argument* with the

defendant Moritz Loth whereby you contracted to reconvey said premises to him or any other persons upon payment of a certain sum of money? If so, state the agreement, and if the same is
51 in writing attach a copy thereof.

Fifth interrogatory. Have you given the defendant Moritz Loth or some one for him any lease for said premises? If so, state the terms thereof.

Sixth interrogatory. Who collects the rents or income from said property?

Seventh interrogatory. What interest, directly or indirectly, legal or equitable, has the defendant Moritz Loth in any of said property?

Eighth interrogatory. Did you pay the consideration named in the deeds of conveyance? If not, state the actual consideration paid.

Ninth interrogatory. Was the consideration paid at the time of the delivery of the conveyance or conveyances, or was the consideration paid in the nature of a debt owing by the defendant Moritz Loth to you at the time; and, if the latter, how much was that debt?

52 (Endorsed on cover:) No. 74375. Hamilton com. pleas court. Meyer Guggenheim, plaintiff, *vs.* Moritz Loth *et al.*, defendants. Petition. Filed Nov. 11th, 1885. D. J. Dalton, clerk. To the clerk: Issue summons as within action for sale of real estate, &c., for receiver, & general relief. We are security for costs. Long, Avery, Kramer & Kramer, att'ys for plaintiff.

THE STATE OF OHIO, } *ss:*
Hamilton County, }

To the sheriff of the county of Hamilton:

You are commanded to notify Moritz Loth and Fredericka Loth, his wife; Adolph Feiss, William Stix, The National Park Bank of New York, a corporation duly created under the laws of the United States; Bernhard Bettman, Abraham J. Friedlander, Ricka Amberg, The First National Bank of Cincinnati, a corporation duly created under the laws of the United States; Elijah Newman, Otto Jaffe and Frederick S. Pinkus, partners as O. Jaffe and Pinkus; J. D. Hearne, The National Bank of Cincinnati, a corporation duly created under the laws of the United States; The Commercial Bank of Cincinnati, a corporation duly created under the laws of Ohio; James Hampden Robb and Charles E. Strong, trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Adler, Philip Stromberg, Abraham Reeser, August Vos, and George A. Clark, defendants, that they have been sued by Meyer Guggenheim, plaintiff, in the court of common pleas of Hamilton county, and that unless they answer by the 12th day of December, A. D. 1885, the petition of the said plaintiff against them filed in the clerk's office of
53 said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of November, A. D. 1885.

Witness my hand and seal of the said court, at Cincinnati, this 13th day of Nov., one thousand eight hundred and eighty-five.

DANIEL J. DALTON,
Clerk of the Court of Common Pleas, Hamilton County, Ohio,
By W. H. SARGENT, *Deputy.*

(Endorsed on cover:) No. 74375. Hamilton common pleas. Meyer Guggenheim, plaintiff, *vs.* Moritz Loth *et al.*, defendants. Summons in action for sale of real estate, &c., for receiver, and general relief. Filed Nov. 23rd, 1885. Daniel J. Dalton, clerk. To 23rd day of Nov., 1885. Long, Avery, Kramer and Kramer, att'y.

We accept service of summons in the within cause for Charles E. Strong & James Hampden Robb, trustees, & for William Stix, this 19th November, 1885.

KEBLER & ROELKER,
Att'ys for Above-named Defendants, Duly Authorized Thereto.

1885, November 18th, served the within-named defendants, Moritz Loth & Bernard Bettmann, by leaving a true copy of this writ, with endorsements thereon, at each of their usual places of residence, and on same day served Fredericka Loth, Elijah Newman, J. D. Hearne, and Henry Adler, by delivering to each
54 of them personally a true copy thereof, with endorsements thereon, and on same day served the First National Bank of Cincinnati, by leaving a true copy hereof at the business office of said bank, in the hands of Theodore Stanwood, its cashier, there being no president, mayor, chairman, or president of the board of directors or trustees, or other chief officer found; also served the Third National Bank of Cincinnati, by leaving a true copy hereof, with endorsements thereon, at its business office, in the hands of J. D. Hearne, its president; also served the Commercial Bank of Cincinnati, by leaving a true copy hereof, with endorsements thereon, at its business office, in the hands of C. B. Foote, its president, and service accepted by Kebler and Roelker, att'ys for Charles E. Strong and James Hampden Robb, trustees, and for William Stix, as per acceptance above written; and on the 19th served Rika Amberg and August Vos, by delivering to each of them personally a true copy hereof, with endorsements thereon, and on the 20th Abraham J. Freidlander and Abraham Reeser, by leaving a true copy hereof, with endorsements thereon, at each of their usual places of resident, and on the 23rd day of November, 1885, service accepted for Henry W. Taylor by Perry & Jenney, his attorneys; as to the other defendants within named, not found.

SAMUEL BERESFORD, *Sheriff,*
By JOS. E. HEART, *D'p'ty.*

55 State of Ohio, County of Hamilton, Court of Common Pleas.

MEYER GUGGENHEIM, Plaintiff,
vs.
MORITZ LOTH, FREDERICKA LOTH, His Wife; JAMES Hampden Robb and Charles E. Strong, Trustees, *et al.*, Defendants. } No. 74375.

Answer and Cross-petition of James Hampden Robb and Charles E. Strong, Trustees.

Now come James Hampden Robb and Charles E. Strong, trustees, and for answer to the plaintiff's petition and the answers and *answers and* cross-petitions heretofore filed in this cause state they are ignorant of the truth of the allegations herein contained and therefore deny the same and demand strict proof thereof.

For cross-petition these defendants state that Moritz Loth, together with Fredericka Loth, his wife, who releases her dower therein, on the fifth day of February, A. D. 1885, duly executed and delivered to these defendants his certain warranty deed, thereby conveying to these defendants, their successors, heirs, and assigns forever, the following real estate, all situated in the city of Cincinnati, county of Hamilton, and State of Ohio, on the westerly side of Vine street north on Mulberry street, viz: Lots marked and numbered 3, 4, and 5, of 20 feet front each, of the subdivision of the tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet and extending
56 back westwardly of same width 132 feet, commencing for numbers from the south, making 5 lots of 20 feet front each, said lots 3, 4, and 5 herein conveyed being 60 feet in front on the west side of Vine street and being the same conveyed to said M. Loth by John Shelley by deed recorded in Deed Book 401, page 382, Hamilton county records; also all that other real estate in said city of Cincinnati, viz: Being all that part of lot No. 2, block 12, on the plat of subdivision made by Gen'l James Findlay, J. C. and J. L. Ludlow, recorded in Book 49, pages 420 to 422, as said block 12 is now subdivided by commissioners in partition of James and Jane Findlay, which fronts 50 feet on the west side of Vine street and extending westwardly of same width in rear as in front to the depth of 100 feet, which lot 2 in said block 12 was set off by said Findlay's commissioners to John King Findlay, and by him conveyed to said M. Loth by deed recorded in Deed Book 358, page 571, Hamilton county records; also all that other lot of land in said city of Cincinnati, viz: All that part of lot 4 on the plat of subdivision made by said Findlay's commissioners of block 12 on said Findlay and Ludlow plat as fronts 50 feet on the west side of Vine street, extending back westwardly of even width in rear as in front to the depth of 100 feet, said 50 ft. front on the west side of Vine St. by 100 ft. deep of said lot 4, block 12, of Findlay and Ludlow, having been, with the rest of lot 4, set off by the Findlay commissioners to James F. Irwin, and by him conveyed to said M.

Loth by deed recorded in Deed Book 389, page 320, Hamilton county records.

Also all that other lot in Cincinnati aforesaid adjoining the easterly line of the lot last described, fronting 17 feet on the west side of Vine street, running back westwardly of even width in rear as in front to the depth of 100 feet, said lot hereby leased being off the westerly part of lot 5 as marked by Findlay's commis-
57 sioners on a plat of subdivision of block 12 of Findlay and Ludlow subdivision, said lot 5 having been set off by said Findlay's commissioners to William Irwin and the part herein described having been deeded by the Franklin Bank of Cincinnati to said M. Loth by deed recorded in Deed Book 401, page 381, Hamilton county records; that said deed was at the time of its date delivered to these defendants in consideration of ten thousand dollars at that time paid by them to said Moritz Loth; that said deed was duly left for record on February 7th, 1885, at 10.50 o'clock a. m., with the recorder of Hamilton county, and recorded in Deed Book 577, page 569, Hamilton county records; that these defendants with said Moritz Loth duly executed and delivered to each other on the fifth day of February, A. D. 1885, their certain indenture of lease, which said lease was duly executed by said James Hampden Robb and Charles E. Strong, trustees, and Moritz Loth, and was duly recorded in Lease Book 78, page 99, Hamilton county records; that by said lease said trustee- leased to said Loth the same premises conveyed by said Loth to said trustees as hereinbefore described for and during the joint lives of Ellen W. Robb and Mary Robb, her daughter, and the survivor of them, said Loth covenanting to pay during the life of Ellen W. Robb and for six months thereafter at the rate of $600 a year, payable in half-yearly installments of $300 each on the 1st of August and February of each year, the first installment being payable August 1st, 1885, and further to pay, six months after the death of Ellen W. Robb, $5,000 to these trustees as the survivor- of them, and also $5,000 more at that time in the event of Mary Robb being then deceased, but in case of Mary Robb then being alive after Ellen W. Robb's death and the payment of said first $5,000 to pay during Mary Robb's life at the rate of $300 a year, payable in half-yearly installments of $150, and further paying upon the death of said Mary Robb a further sum of $5,000; said
58 Loth further covenanted to pay all taxes and assessments levied, rated, or charged upon said premises during the life of this lease; to keep said premises insured in $5,000, loss payable or to be used in repairing and rebuilding said premises; to keep the improvements on said premises in as good order and repair as they were at the date of the lease; said lease further provided that said trustee-, the lessers, should, upon the death of Ellen W. and Mary Robb and the payment to them of all rents and the further sum of $10,000, convey said leased premises to said Moritz Loth by deed of special warranty; said lease further provided that if said Loth should fail to make the payments therein stipulated within 30 days after the same became due and without demand therefor or should fail to pay the taxes, assessments, or premiums of insurance that might

become due, or to keep and perform any of the other of the covenants and agreements by him to be kept and performed, then it should be lawful for said lessors into said premises to re-enter and the same to have again, repossess, and enjoy as in their first and former estate, and thereupon said lease, at the option of said lessors, should cease and determine, and these defendants file herewith and mark Exhibit A a copy of said lease. These defendants further state that said Moritz Loth accepted and took possession under said lease and paid the taxes for the last half of 1884, and also the rental due August 1st, 1885, and that said Ellen W. Robb and Mary Robb are still living.

Wherefore these defendants ask that their interests be protected in the premises and for all proper and equitable relief.

By KEBLER AND ROELKER,
Attorneys for James Hampden Robb and Charles E. Strong, Trustees.

STATE OF OHIO, }
County of Hamilton, } *ss:*

59 Charles A. Kebler states he is one of the attorneys for the above-named defendants; that said defendants are now residents of the State of Ohio and absent therefrom, and that the allegations in the foregoing pleading are true as he believes.

CHARLES A. KEBLER.

Sworn to before me and subscribed in my presence this December 8th, 1885.

40 cents due notary.

____ ____.
Notary Public, Hamilton County, Ohio.

Answers of James Hamden Robb and Charles E. Strong, Trustees, to Interrogatories Propounded by Plaintiff in His Petition.

In answer to first interrogatory. The sum of ten thousand dollars to Moritz Loth.

To second interrogatory. None.

To third interrogatory. The lease filed with this pleading and marked Exhibit A.

To fourth interrogatory. None except Exhibit A, filed herewith.

To fifth interrogatory. Yes; Exhibit A, as above.

To sixth interrogatory. Kebler and Roelker, our attorneys, collect the rental provided for by said lease, Exhibit A aforesaid; Moritz Loth, we suppose, of the property itself.

To seventh interrogatory. The interest as evidenced by lease, Exhibit A, aforesaid.

60 *The* eight- interrogatory. Yes. $10,000.

To ninth interrogatory. The consideration was paid at the time of the delivery of the deed.

CHARLES A. KEBLER.

STATE OF OHIO, *County of Hamilton,* } ss:

Charles A. Kebler, being duly sworn, states that he is attorney of Robb and Strong, trustees, and was on February 5th, 1885; that said trustees are now residents of this State and absent therefrom; that the foregoing answers are within his personal knowledge and true.

CHARLES A. KEBLER.

Sworn to before me and subscribed in my presence this December 8th, 1885.

FERD. JELKE, JR.,
Notary Public, Hamilton County, Ohio. [SEAL.]

40c. due notary.

61 (Endorsed on cover:) No. 74375. Hamilton county court of common pleas. Meyer Guggenheim, plaintiff, *vs.* Moritz Loth, Fredericka Loth, his wife; James Hampden Robb, and Charles E. Strong *et al.*, defendants. Answer and cross-petition of James Hampden Robb and Chas. E. Strong, trustees. Filed Dec. 18th, 1885. D. J. Dalton, clerk. Kebler & Roelker, att'ys.

State of Ohio, County of Hamilton, Court of Common Pleas.

MEYER GUGGENHEIM, Plaintiff, *vs.* MORITZ LOTH, FREDERICKA LOTH, His Wife; WILLIAM STIX, *et al.*, Defendants.	No. 74375. Answer and Cross-Petition of William Stix.

Now comes William Stix, and for answer to plaintiff's petition and the answer and cross-petition heretofore filed in this cause says he knows nothing of the allegations therein contained, and therefore denies the same and demands strict proof thereof.

By way of cross-petition this defendant states that Moritz Loth and Fredericka Loth, his wife, defendants herein, on March 30th, 1885, duly executed and delivered to William Stix, this defendant, their mortgage deed, conveying to said William Stix, his heirs and assigns forever, the following leasehold estate, in the city of Cincinnati, county of Hamilton and State of Ohio, viz:

62 1. Being part of lots (5) five, (6) six, and seven (7) on plat N, made by commissioners in partition of the estates of James and Jane Findlay in causes Nos. 9569 & 9570 of the Hamilton county court of common pleas, as recorded in volume 222 of said records, said lots 5, 6, & 7 being part of block 12, in Findlay and Ludlow's plat, recorded in Deed Book 49, page 420, Hamilton county records, the parts of said lots herein conveyed being described as follows, to wit: Commencing at a point on the west side of Vine street 17.41 ft. north of the southeast corner of said lot 5, thence westerly on a line parallel with the south line of said lot 100 feet to a point; thence northerly on a line parallel with Vine street

82.59 feet to the north line of said lot 6; thence easterly along the north line of lot 6 100 feet to the west side of Vine street, 82.59 feet — more or less, *to* the west side of Vine street, part of lot 7 aforesaid, being all the space between the southerly line of the lot formerly owned by M. Plunkett and the north line of lot 6 aforesaid, and running back westerly along the line of lot 7 90 feet in depth, being narrower in the rear than in front; all the above-described premises being the same conveyed by Moritz Loth and wife to H'y W. Taylor by deed recorded in Deed Book 578, page 347, Hamilton county records, perpetually leased by said Taylor to said Loth by lease recorded in Lease Book 76, page 582, Hamilton county records.

2. A. Also the following-described leasehold estate, in the aforesaid city, county, and State, on the westerly side of Vine street north of Mulberry street, viz: Lots marked and numbered 3, 4, & 5, of 20 ft. front each, of the subdivision of the tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet, extending back westwardly of same width 132 feet, commencing for numbers from
63 the south, making 5 lots of 20 feet front each, said lots 3, 4, & 5, herein described, being 60 feet in front on the west side of Vine St., and being the same conveyed to said Moritz Loth by John Sheiley by deed recorded in Deed Book 401, page 382, Hamilton county records. "S." Also all that other leasehold estate in the aforesaid city, county, and State, viz: Being all that part of lot 2, block 12, on the plat of subdivision laid out by Gen. James Findlay, J. C. & J. L. Ludlow, recorded in Book 49, page- 420 to 422, Hamilton county records, as said block 12 is now subdivided by commissioners in partition of the estate of James & Jane Findlay, which fronts 50 feet on the west side of Vine street and extending back westwardly same width in rear as in front 100 feet, said lot 2 having been set off by said Findlay's commissioners to John King Findlay and conveyed by said J. K. Findlay to Moritz Loth by deed recorded in Deed Book 385, page 571, Hamilton county records. "C." Also all those leasehold premises in the aforesaid city, county, & State described as follows, viz: All that part of lot 4 on the plat of subdivision of said Findlay's commissioners of block 12 on said subdivision made by Findlay and Ludlow as fronts 50 feet on the west side of Vine St., extending back westwardly of even width in rear as in front 100 ft., all of said lot 4 having been set off by said Findlay's commissioners to James F. Irwin and by him conveyed to said Moritz Loth by deed recorded in Deed Book 389, page 320, Hamilton county records. "D." Also all those leasehold premises in the aforesaid city, county, and State adjoining the easterly line of the lot last described, fronting 17 feet on the west side of Vine street and running back of even width in rear as in front 100 feet, said 17 feet being off the westerly part of lot 5 as marked by Findlay's commissioners on a plat of subdivision of block 12 of Findlay & Ludlow's subdivision, said lot 5 being
64 set off by said commissioners to William Irwin, and the 17

feet herein described being conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed and recorded in Deed Book 401, page 381, Hamilton county records, all the foregoing leasehold premises from the number "2" near the end of the second page of this cross-petition & marked "A," "B," "C," "D," being the same premises conveyed by Moritz Loth & wife to Robb & Strong, trustees, by deed dated February 5th, 1885, & recorded in Deed Book —, page —, Hamilton county records, & by Robb & Strong, trustees, leased to said Loth by lease dated February 5th, 1885, and recorded in Lease Book —, page —, Hamilton county records.

3. Also the following-described real estate, in said city of Cincinnati, county and State aforesaid, viz: The south 25 feet of lot 96, the whole of lot 97, and the north 35 feet of lot 98 on the westerly side of Fox, now Loth, street, in a subdivision of lots among the heirs of James and Jane Findlay of block 11 of Findlay and Ludlow's subdivision, the said real estate above described fronting 100 feet on the westerly side of Loth street and running back of even width in rear as in front to the westerly line of said lots and being part of the same premises conveyed to Moritz Loth by William Rankin and wife by deed recorded in Deed Book 401, page 387, Hamilton county records.

This defendant further states that said mortgage was executed and delivered to him to secure a loan of ten thousand dollars at that time made by him to said Loth; that said conveyance contained a condition that if said Loth should cause to be paid to the order of defendant 25 promissory notes, all dated March 30th, 1885, made by said Moritz Loth to the order of this defendant and all bearing 7% interest after maturity, one, the note for the
65 principal, being for $10,000, payable six years after date, with 7% interest after maturity, payable quarterly, the other 24 being interest notes, being for $175 each at 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, & 72 months after date respect*fully*, then said conveyance would be void, and further provided that if any one of said interest notes should not be paid at maturity the $10,000 principal note became due, payable, and collect*a*ble and the mortgage securing it foreclos*e*able immediately after any such default.

This defendant further states that the two notes for $175 each at 3 & 6 months were paid at maturity by said Loth; that said mortgage was on April 9th, 1885, at 11.20 o'clock a. m., left with the recorder of Hamilton county for record, and was duly recorded in Mortgage Book 496, page 524, Hamilton county records; that said mortgage is valid and in full force and is the first and best lien on the leasehold premises and real estate therein described.

Wherefore this defendant asks that his interest in said premises or any part be protected; that if said premises or any part be sold the first proceeds shall be used in the payment of his claim above set out, and for all other proper and equitable relief.

By KEBLER & ROELKER,
Attorneys for Wm. Stix.

STATE OF OHIO, } ss:
County of Hamilton, }

Charles A. Kebler states he is one of the attorneys of William Stix, the above-named defendant; that said William Stix is
66 a non-resident of the State of Ohio & absent therefrom, and that the allegations and statements of the foregoing answer and cross-petition are true, as he believes.

CHARLES A. KEBLER.

Sworn to before me and subscribed in my presence this December 7th, 1885.

FERD. JELKE, JR.,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

40c. due notary.

67 (Endorsed on cover:) No. 74375. Hamilton county court of common pleas. Meyer Guggenheim, plaintiff, *vs.* Moritz Loth *et al.*, defendants. Answer and cross-petition of William Stix. Filed Dec. 7th, 1885. D. J. Dalton, clerk. Kebler & Roelker, att'ys for Wm. Stix.

Hamilton County Pleas Court.

MEYER GUGGENHEIM, Plaintiff, } No. 74375. Answer of James H. Robb & Charles E. Strong, trustees, to Cross-petition of W. Stix.
vs.
MORITZ LOTH *et al.*, defendants. }

Now comes James H. Robb and Charles E. Strong, trustees, and reiterate the allegations in their answer and cross-petition heretofore filed, and, by way of answer to the cross-petition heretofore filed and by way of answer to the cross-petition of William Stix filed in this action, state that they admit the allegations therein, except that they allege that the lien on the property described in their answer and cross-petition heretofore filed is prior in time to the lien of William Stix upon said property.

These defendants further state that Ellen W. Robb is still alive, and that Moritz Loth has failed to pay the rental due on February 1st, 1886, and that the same is now due and unpaid, and that these defendants are entitled to have said premises sold for payment of said rental and join in the prayer of William Stix for the
68 appointment of a receiver and for the sale of said premises, and further ask that the fee simple of the premises described in their answer and cross-petition heretofore filed be sold, and that they be repaid the ten thousand dollars coming due to them upon said sale, three hundred dollars due on February 1st, 1886, and interest thereon, and interest on said ten thousand dollars from said February 1st, 1886, payable semi-annually, and further ask for the appointment of a receiver.

Wherefore these defendants ask that their interest be protected, and for all other proper and equitable relief.

By KEBLER & ROELKER,
Attorneys for James H. Robb and Charles E. Strong, Trustees.

STATE OF OHIO, }
County of Hamilton, } ss:

Charles A. Kebler states that he is one of the attorneys for James Hamden Robb & Charles E. Strong, trustees; that they are both absent from the State of Ohio and non-residents thereof, and that the allegations in the foregoing answer are true, as he believes.

CHARLES A. KEBLER.

Sworn to before me and subscribed in my presence this 21st day of July, 1886.

GEORGE SIDNEY TAYLOR,
[SEAL.] *Notary Public, Ham. Co., Ohio.*

40c. due notary.

69 (Endorsed on cover:) No. 74375. Hamilton county court of Common Pleas. Meyer Guggenheim, plaintiff, *vs.* Moritz Loth *et al.*, defendants. Answer of Robb and Strong, trustees, to cross-petition of William Stix. Filed July 24th, 1886. D. J. Dalton, clerk. Kebler & Roelker.

Hamilton County Court of Common Pleas.

MEYER GUGGENHEIM, Plaintiff,
vs.
MORITZ LOTH, FREDERICKA LOTH, His Wife; ADOLPH Feiss, William Stix, The National Park Bank of New York, a Corporation Duly Created under the Laws of the United States; Bernhard Bettmann, Abraham J. Freidlander, Ricka Amberg, The First National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; Elijah Newman, Frederick S. Pinkus, Otto Jaffe, & Frederick S. Pinkus, as O. Jaffe & Pinkus; J. D. Hearne, The Third National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; The Commercial Bank of Cincinnati, a Corporation Duly Created under the Laws of Ohio; James Hamden Robb & Charles E. Strong, Trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Adler, Louis Adler, Phillip Stromberg, Abraham Reeser, August Vos, George A. Clark, The City of Cincinnati for the Use of Thomas Lloyd, and The City of
70 Cincinnati for the Use of B. D. Barton, Defendants.

No. 74375. Decree.

This cause coming on for hearing upon the cross-petition of William Stix and upon the amending and supplemental answer and cross-petition of William Stix, the petition of plaintiffs, and the other pleadings in this cause and testimony, the court, upon further consideration, find that Moritz Loth and Fredericka Loth, his wife, have been duly served by the sheriff of Hamilton county with pro-

cess in this cause and are legally before court, and that they are in default for answer or demurrer to the answer and cross-petition and amended and supplemental answer and cross-petition of William Stix and also to the answer and cross-petition of Henry W. Taylor.

The court further find that on March 30th, 1885, Moritz Loth, in consideration of ten thousand dollars ($10,000.00) then loaned to him by William Stix, executed and delivered to said William Stix four notes of that date, made by said Moritz Loth, payable to the order of said William Stix, with interest after maturity at the rate of 7% per annum, payable semi-annually, three of said notes being for one hundred and seventy-five dollars ($175) each, payable nine (9), twelve (12), and fifteen (15) months after date respect*fully*, the fourth note being for ten thousand dollars ($10,000), payable six years after date, with the agreement, however, that should any one of twenty-four (24) one hundred and seventy-five dollars ($175) interest notes not be paid at maturity, then said ten-thousand-dollar note should become due, payable, and collect*a*ble and the mortgage securing the same foreclosable immediately after any such default.

This court further find that three of said notes, payable nine (9), twelve (12), and fifteen (15) months after date, were not paid at maturity and are still unpaid.

71 That, by reason of the non-payment of said three notes, payable nine (9), twelve (12), and fifteen (15) months after date, said ten thousand dollars note became due, payable, and collect*a*ble, and that the same is now due, payable, and collectable, and that said four notes are wholly unpaid, and that there is due to said William Stix from said Moritz Loth upon said four notes the sum of ten thousand nine hundred and five dollars and fifty-six cents ($10,905.56), with seven per cent. (7 %) interest from the third day of January, 1887, payable quarterly.

It is, therefore, the judgment of this court that said William Stix recover from said Moritz Loth said sum of $10,905.56, with seven per cent. interest from the 3rd day of January, 1887, payable quarterly.

This cause further coming on for hearing upon the answer and cross-petition and the amended and supplemental answer and cross-petition of Henry W. Taylor, the court find that, in consideration of the sum of eight thousand ($,000) dollars, then loaned and paid to him by said Henry W. Taylor, *and* Moritz Loth, upon the date therein set out, executed and delivered to said Henry W. Taylor the deed set out in said cross-petition of Henry W. Taylor, and that Henry W. Taylor thereupon executed and delivered the lease therein set out to said Moritz Loth, and that said deed and lease were in reality a mortgage to secure the payment of said sum of $8,000.00, with interest at six per cent. per annum, payable semi-annually.

The court further find that by the non-payment of the installments of rent provided for in said lease the principal amount, $8,000.00, has become due, payable, and collect*a*ble, and that the installment of said interest or rent falling due on January 28th, 1886, two hundred and forty dollars ($240), and July 28th,

72 1886, two hundred and forty dollars ($240), are all due, pay-

able, and collectable, and that there is due to said Henry W. Taylor from said Moritz Loth for the installments therein named and the amount originally loaned the sum of $8,707.17, with six per cent. interest from the third day of January, 1887, payable semi-annually.

It is, therefore, the judgment of this court that said Henry W. Taylor recover from said Moritz Loth the sum of $8,707.16, with interest at six per cent. from the third day of January, 1887, payable semi-annually.

The court further find that said Moritz Loth, in order to secure the prompt payment of the note made to the order of William Stix, executed and delivered to said William Stix a mortgage dated March 30th, 1885, upon all that real and leasehold estate in Hamilton county, Ohio, described as follows, to wit:

The following leasehold estate in the city of Cincinnati, county of Hamilton, and State of Ohio, viz:

1. Being parts of lots five (5), six (6), and seven (7), on plat N, made by commissioners in partition of the estate of Jane and James Findlay in causes Nos. 9569 and 9570 of the Hamilton county court of common pleas, as recorded in volume 222 of said records, said lots 5, 6, and 7 being part of block 12, in Findlay & Ludlow's plat, recorded in Deed Book 49, page 420, Hamilton county records, the parts of said lots herein conveyed being described as follows:

Commencing at a point on the west side of Vine street seventeen and forty-one hundredths (17.41) feet north of the southeast corner of said lot five (5), thence west on a line parallel with the south line of said lot one hundred (100) feet to a point; thence north on a line parallel with Vine street eighty-two and fifty-nine hun-
73 dredths (82.59) feet to the north line of said lot six (6); thence east along the north line of said lot six (6) one hundred feet to the west side of Vine street, eighty-two and fifty-nine hundredths (82.59) feet to the point of beginning.

Also forty-four (44) feet, more or less, on the west side of Vine street, part of — seven (7) aforesaid, being all the space between the southerly line of the lot formerly owned by M. Plunket and the north line of lot six aforesaid and running back west along the line of lot seven (7) ninety (90) feet in depth, being narrower in the rear than in front, all the above-described premises being the same conveyed by Loth and wife to Henry W. Taylor by deed recorded in Deed Book 578, page 347, Hamilton county records, and perpetually leased by said Taylor to said Loth by lease recorded in Lease Book 76, page 582, Hamilton county records.

2 (*a*). Also the following-described leasehold estate in the aforesaid city, county, and State on the west side of Vine street north of Mulberry street, viz: Lots marked and numbered three (3), four (4), and five (5) of twenty (20) feet front each of the subdivision of the tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street one hundred feet and extending back west of the same width one hundred and thirty-two (132) feet, commencing for numbers from the south,

making five lots of twenty (20) feet front each, said lots three (3), four (4), and five (5) herein described being sixty (60) feet in front on the west side of Vine street and being the same conveyed to said Moritz Loth by John Shelley by deed in Book 401, page 382, Hamilton county records.

(*b.*) Also all that other leasehold estate in the aforesaid city, county, and State, viz:

74 All that part of lot two (2) on the plat of subdivision laid out by Gen. James Findlay, J. C. and J. L. Ludlow, recorded in Book 49, pages 420 to 422, Hamilton county records, as said block 12 is now subdivided by commissioners in partition of the estate of James and Jane Findlay, which fronts fifty (50) feet on the west side of Vine street and extending back westwardly of the same width in rear as in front one hundred (100) feet, said lot two (2) having been set off by said Findlay's commissioners to John King Findlay and conveyed by said John K. Findlay to Moritz Loth by deed in Book 358, page 571, Hamilton county records.

(*c.*) Also all those leasehold premises in the aforesaid city, county, and State described as follows:

All that part of lot (4) four on the plat of subdivision made by said Findlay's commissioners on block 12 on said subdivision made by Findlay & Ludlow as fronts fifty (50) feet on the west side of Vine street, extending back west of even width in rear as in front one hundred feet, all of said lot four (4) having been set off by said Findlay's commissioners to James F. Irwin and by him conveyed to said Moritz Loth by deed *book* recorded in Deed Book 389, page 320, Hamilton county records.

(*d.*) Also all those leasehold premises adjoining the easterly line of lot last described, fronting seventeen (17) feet on the west side of Vine street and running back of even width in rear as in front one hundred (100) feet, said seventeen (17) feet being off the west part of lot five (5) as marked by Findlay's commissioners on a plat of subdivision of block 12 of Findlay and Ludlow's subdivision, said lot five (5) being set off by said commissioners to William Irwin and the seventeen feet herein described being conveyed to Moritz Loth by Franklin Bank of Cincinnati by deed in Deed Book 401, page 381, Hamilton county records; all the foregoing lease-

75 hold premises from the number "2" near the end of the fifth page hereof, and marked "*a*," "*b*," "*c*," "*d*," being the same premises conveyed by Loth and wife to Robb & Strong, trustees, by deed dated February 5th, 1885, recorded in Deed Book —, page —, Hamilton county records, and by Robb and Strong, trustees, leased to said Loth by lease dated February 5th, 1885, and recorded in Lease Book —, page —, Hamilton county records.

3. Also the following-described real estate, viz: The south twenty-five (25) feet of lot ninety-six (96), the whole of lot ninety-seven (97), the north thirty-five (35) feet of lot ninety-eight (98), on the west side of Fox (now Loth) street, in a subdivision of lots among the heirs of James and Jane Findlay, of block 11 of Findlay & Ludlow's subdivision, the real estate above described fronting one hundred and ten (100) feet on the west side of Loth street and running

back of even width in rear as in front to the west line of said lots, and being part of the same premises conveyed to Moritz Loth by Wm. Rankin and wife by deed in Deed Book 401, page 387, Hamilton county records.

And that said Fredericka Loth, his wife, united with her husband in the execution of said mortgage, and that the same was legally executed by them and was duly recorded in the records of Hamilton county in Mortgage Book 496, page 524, on the ninth day of April, 1885, at 11.50 o'clock a. m., and is in full force, and that said William Stix is the owner of the same.

The court further find that the condition of said mortgage to William Stix has been broken and that William Stix is entitled to have the equity of redemption of said defendants, Moritz Loth and Fredericka Loth, his wife, and said mortgaged premises foreclosed, and to have said premises sold for the payment of the amount due to him.

76 It is further ordered, and it is ordered with the consent of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, that the fee-simple title of the premises described in said mortgage to William Stix be sold, and said premises sold freed from the claims of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, and all other parties to this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale.

And it further appearing to the court that the real estate described in said mortgage will bring a better price if sold by a special master commissioner who is acquainted with the property and who can sell the same on the premises and advertise by posters *and* &c., it is ordered and is therefore the judgment of the *judgment of the* court that unless Moritz Loth and Fredericka Loth, his wife, or some one for them within five days from the entry of this judgment pay to William Stix or his attorney-, Kebler, Roelker & Jelke, the sum of $10,905.56, with interest at the rate of seven per cent. from the third day of January, 1887, payable quarterly, and pay the costs of this court, taxed at $—, the equity of redemption of said Moritz Loth and Fredericka Loth, his wife, be foreclosed and said premises shall be sold and an order of sale shall issue therefore to George Sidney Tylor, special master *of* commissioner of this court, hereby appointed for that purpose, directing him to sell said premises, freed from the claim of all parties to this action, as upon execution, and bring the proceeds into court for further order, and all questions of priority of lien are reserved for the future consideration of this court.

It is further ordered that said sale shall be upon the premises and that the different parcels be separately appraised; that

77 the terms of sale shall be either all cash or, at the purchaser's option, one-fourth cash and the balance in one, two, and three years, the deferred payments to bear interest from date, payable annually, and be secured by purchase-money mortgage upon the premises sold, and said special master is authorized to expend a reasonable sum of money for duly advertising the same by post-

ers, hand-bills, &c., and engaging an auctioneer for the same, and it is ordered that before entering upon his duties said George Sidney Tylor shall enter into an undertaking, to the approval of this court and condition- according to law, in the sum of fifteen thousand dollars ($15,000).

And thereupon came George Sidney Tylor and accepted said appointment and as such special master presented his bond with Emily H. Tylor and Daniel Collier as sureties, which was approved by the court; and thereupon said George Sidney Tylor was duly sworn by the court and took the oath of office as such special master.

(Endorsed on cover:) No. 74375. Hamilton county common pleas court. Meyer Guggenheim, plaintiff, *vs.* Moritz Loth *and et al.*, defendant-. Decree. Consent. Perry and Jenney for H. W. Taylor; Lincoln, Stephens & Lincoln for First National bank. Ent. Feb. 15th, '87. Ent. Min., 260.

STATE OF OHIO, }
Hamilton County, } *ss:*

Pursuant to the command of the within order, after having appraised the real estate therein described, I advertised the same for sale in a public newspaper, printed in the city of Cincinnati, called the Cincinnati Commercial Gazette, and in a German newspaper, printed in the city of Cincinnati, called the Cincinnati Daily Volksblatt, being newspapers of general circulation in the county
78 of Hamilton aforesaid, and after having so advertised once a week for five consecutive weeks, as the statute directs, and having given due notice of the time and place of such sale, I proceeded at the time and place so advertised, to wit, the 16th day of April, A. D. 1887, at 2 p. m. o'clock, on the premises, in the city of Cincinnati, in said county, to offer the said property at public sale and then and there, at public outcry, struck off and sold the same in parcels, as directed, as follows:

1st. Commencing at a point on the west side of Vine street 17.41 feet north of the southeast corner of lot five (5), block 12, of Findlay and Ludlow's commissioners' subdivision, thence west on a line parallel with the south line of said lot 100 ft. (one hundred feet) to a point, thence on a line parallel with Vine street 82.59 feet to the north line of lot 6, thence east along the north line of said lot 6 one hundred feet (100 ft.) to the west side of Vine street, and thence south along the west side of Vine street 82.59 ft. to the point of beginning, appraised at $10,303.60, sold to August Vos at $7,400, said sum being more than two-thirds of the appraised value of said parcel of land, and the above-named August Vos being the highest and best bidder for said premises and the purchaser thereof.

2nd. Forty-four feet, more or less, on the west side of Vine street, part of lot seven (block 12), being all the space between the southerly line of the lot formerly owned by M. Plunckett and the north line of lot 6 aforesaid and running back west along the line of lot 7 ninety feet in depth, narrower in rear than in front, appraised at $7,000.00, sold to William Stix at $6,425, said sum being more

than the appraised value of said parcel of land and the above-named Wm. St-x being the highest and best bidder for said premises and the purchaser thereof.

79 3rd. Lots marked and numbered three (3), four (4), and five (5) of twenty feet front each of the subdivision of the tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, running south on Vine street one hundred feet and extending back west of same width in rear as in front 132 ft., commencing for numbers from the south, making five lots of twenty feet front each, said lots 3, 4, and 5 therein described being 60 feet in front on the west side of Vine street, appraised at $12,000.00, sold to August Vos at $9,100, said sum being more than two-thirds of the appraised value of said parcel and the above-named August Vos being the highest and best bidder for said premises and the purchaser thereof.

4th. All that part of lot 2, block 12, in Findlay and Ludlow's commissioners' subdivision which fronts 50 feet on the west side of Vine street and extends back westwardly in rear as in front of same width one hundred feet (100 ft.), appraised at $40.00 per foot, sold to William Stix at $26.67 per foot, amounting to $1,333.50, being more than the appraised value of said parcel and the above-named William Stix the highest and best bidder for said premises and the purchaser thereof.

5th. All that part of lot 4, block 12, of said subd. as fronts fifty (50) feet on the west side of Vine street and extending back of even width in rear as in front one hundred (100) feet, appraised at $40 per foot, sold to William Stix at $26.67 per foot, amounting to $1,333.50, being more than two-thirds of the appraised value of said parcel and the above-named Wm. Stix being the highest and best bidder for said premises and the purchaser thereof.

80 6th. All those premises adjoining the easterly line of lot described, fronting 17.41 feet on the west side of Vine street and running back of even width in rear as in front one hundred feet, being off the west part of lot 5, appraised at $40 per foot, sold to William Stix for $26.67 per foot, amounting to $464.32, being more than two-thirds of the appraised value of said parcel and the above-named Wm. Stix being the highest and best bidder for said premises and the purchaser thereof.

7th. The south twenty-five (25) feet of lot 96, the whole of lot 97, and the north thirty-five (35) feet of lot 98, on the west side of Fox (now Loth) street, in block 11, Findlay and Ludlow's commissioners' subdivision, fronting 110 feet on the west side of Loth street and running back of even width in rear as in front to the west line of said lots, appraised at $50 per foot. Sold the south twenty-five feet of said lot 96 to William Stagge at $50.56 per foot, amounting to $1,262.50 being more than two-thirds of the appraised value of said parcel and the above-named Wm. Stagge the highest and best bidder for the premises and the purchaser thereof.

Sold the north 25 feet of said lot 97 at $46 per foot, amounting to $1,150, to David C. Tappe, $46 per foot being more than two-thirds

of the appraised value of said premises and the above-named David C. Tappe the best and highest bidder for the premises and the purchaser thereof.

Sold the south 25 feet of lot 97 to August Vos at $44 per foot, amounting to $1,100, and being more than two-thirds of the appraised value of said premises and the above-named August Vos the best and highest bidder for the premises and the purchaser thereof.

81 8th. Sold the north 35 feet of lot 98 aforesaid to August Vos at $42 per foot, amounting to $1,470 *to August Vos*, being more than two-thirds of the appraised value of said premises, and the above-named August Vos being the best and highest bidder for the premises and the purchaser thereof.

All of which is respectfully submitted.

GEORGE SIDNEY TYLER,
Special Master Commissioner.

Amount of sale, $31,038.82.

As purchasers demand more time for examination of title, payment need not be made until the examination of titles *are* completed.

K. & ROELKER,
Att'ys for Wm. Stix & Robb and Strong, Trustees.
PERRY & JENNEY,
For H. W. Taylor.

STATE OF OHIO,)
Hamilton County,) *ss:*

Hamilton Common Pleas.

To George Sidney Tylor, Esq., special master commissioner of this court, Greeting:

Whereas on the 13th day of November, 1885, Meyer Guggenheim, plaintiff, filed in our court of common pleas in and for the county of Hamilton aforesaid his certain petition against Moritz Loth *et al.*, defendants, and whereas on December 7th, 1885, William Stix filed his certain answer and cross-petition herein against plaintiff and his codefendant praying therein, among other things, for the

82 sale of certain real estate in said cross-petition and hereinafter described; and whereas, afterwards, to wit, on the 15th day of February, in the term of January, 1887, of said court of common pleas, an order was made in said court in said cause and entered upon its journal finding, among other things, that there is due to said William Stix from said Moritz Loth upon said four notes the sum of ten thousand nine hundred and five dollars and fifty-six cents ($10,905.56), with seven per cent. (7 %) interest from the third day of January, 1887, payable quarterly—

It is therefore the judgment of this court that said William Stix receive from said Moritz Loth said sum of $10,905.56, with seven per cent. interest from the 3rd day of January, 1887, payable quarterly.

The court further find that said Moritz Loth, in order to secure the prompt payment of the notes made to the order of William Stix, executed and delivered to said William Stix a mortgage dated March 30th, 1885, upon all that real and leasehold estate in Hamilton county, Ohio, described as follows, to wit:

The following leasehold estate, situate in the city of Cincinnati, county of Hamilton and State of Ohio, viz., being parts of lot five (5), six (6), and seven (7) on plat N made by commissioners in partition of the estate of Jane and James Findlay in cases No. 9569 and 9570 of the Hamilton county court of common pleas as recorded in volume 222 of said records, said lots 5, 6, and seven being part of block 12, in Findlay and Ludlow's plat, recorded in Deed Book 49, page 420, Hamilton county records, the same parts of said lots herein conveyed being described as follows:

Commencing at a point on the west side of Vine street seventeen and forty-one hundredths (17.41) feet north of the southeast corner of said lot five (5), thence west on a line parallel with
83 the south line of said lot one hundred (100) feet to a point, thence west on a line parallel with Vine street eighty-two and fifty-nine hundredths (82.59) feet to the north line of said lot six (6), thence east along the north line of said lot six one hundred (100) feet to the west side of Vine street, and thence south along the west side of Vine street eighty-two and fifty-nine hundredths (82.59) feet to the point of beginning.

Also forty-four (44) feet, more or less, on the west side of Vine street, part of lot seven (7) aforesaid, being all the space between the southerly line of the lot formerly owned by Mr. Plunkett and the north line of lot six (6) aforesaid, and running back west along the line of lot seven (7) ninety (90) feet in depth, being narrower in the rear than in the front, all the above-described premises being the same conveyed by Loth and wife to Henry W. Taylor by deed recorded in Deed Book 578, page 347, Hamilton county records, and perpetually leased by said Taylor to said Loth by lease recorded in Lease Book 76, page 582, Hamilton county records.

2 (*a*). Also the following-described leasehold estate in the aforesaid city, county, and State, on the west side of Vine street north of Mulberry street, viz:

Lots marked and numbered three (3), four (4), and five (5) of twenty (20) feet front each of the subdivision of the tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, running south on Vine street one hundred (100) feet and extending back west of the same width one hundred and thirty-two (132) feet, commencing for numbers from the south, making five lots of twenty
(20) feet front each, said lots three (3), four (4), and five (5)
84 therein described being sixty (60) feet in front on the west side of Vine street and being the same conveyed to said Moritz Loth by John Shelley by deed in Book 401, page 382, Hamilton county records.

(*b*.) Also all that other leasehold estate in the aforesaid city, county, and State, viz: All that part of lot two (2), block 12, in the

plat of subdivision laid out by Gen. James Findlay, J. C. and J. L. Ludlow, recorded in Book 49, pages 420 to 422, Hamilton county records, as said block 12 is now subdivided by commissioners in partition of the estate of James and Jane Findlay, which fronts fifty (50) feet on the west side of Vine street and extending back westwardly of the same width in rear as in front of one hundred (100) feet, said lot two (2) having been set off by said Findlay's commissioners to John King Findlay and conveyed by said J. K. Findlay to Moritz Loth by deed in Book 358, page 571, Hamilton county records.

(*c.*) Also all those leasehold premises in the aforesaid city, county, and State described as follows: All that part of lot four (4) in the plat of subdivision made by said Findlay's commissioners on block 12 in said subdivision by Findlay and Ludlow as fronts fifty (50) feet on the west side of Vine street, extending back west of even width in rear as in front one hundred feet, all of said lot four (4) having been set off by said Findlay's commissioners to James F. Irwin and by him conveyed to said Moritz Loth by deed recorded in Deed Book 389, page 320, Hamilton county records.

(*d.*) Also all those leasehold premises adjoining the easterly line of lot last described; fronting seventeen (17) feet on the west side of Vine street and running back of even width in rear as in front one hundred (100) feet, said seventeen (17) feet being off the west part of lot five (5) as marked by Findlay commissioners on a plat of subdivision of block 12 of Findlay and Ludlow's subdivision, said lot
of five (5) being set off by said commissioners to William
85 Irwin, and the seventeen (17) feet therein described being conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed in Deed Book 401, page 381, Hamilton county records, all the foregoing leasehold premises from the numbers 2 near the end of the fifth — thereof and marked *a*, *b*, *c*, *d* being the same premises conveyed by Loth and wife to Robb and Strong, trustees, by deed dated February 5th, 1885, recorded in Deed Book —, page —, Hamilton county records, and by Robb and Strong, trustees, leased to said Loth by lease dated February 5th, 1885, and recorded in Lease Book —, page —, Hamilton county records.

(3.) Also the following-described real estate, viz: The south twenty-five feet of lot ninety-six (96), the whole of lot ninety-seven (97), the north thirty-five (35) feet of lot ninety-eight (98) on the west side of Fox (now Loth) street, in a subdivision of lots among the heirs of James and Jane Findlay, of block 11 of Findlay and Ludlow's subdivision, the real estate above described fronting one hundred and ten (110) feet on the west side of Loth street and running back of even width in rear as in front to the west line of said lots, and being part of the same premises conveyed to Moritz Loth by Wm. Rankin and wife by deed in Deed Book 401, page 387, Hamilton county records.

The court further find that the condition of said mortgage to William Stix has been broken, and that William Stix is entitled to lease the equity of redemption of said defendants, Moritz Loth and Fredericka Loth, his wife, and said mortgaged premises foreclosed,

and to leave said premises foreclosed and to have said premises sold for the payment of the amount due him and ordering that the fee-simple title of the premises described in said mortgage to William Stix be sold, and said premises sold freed from the claims of Henry W. Taylor and Charles E. Strong and James Hampden Robb,
86 trustees, and all other parties to this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale, and that unless Moritz Loth and Fredericka Loth, his wife, or some one for them, within five (5) days from the entry of this judgment, pay to William Stix or his attorneys, Kebler, Roelker and Jelke, the sum of $10,905.56, with interest at seven per cent. from the third day of January, 1887, payable quarterly, and pay the costs of this court, taxed $—, the equity of redemption of said Moritz Loth and Fredericka Loth, his wife, be foreclosed and said premises shall be sold and an order of sale shall issue therefore to you, directing you to sell said premises freed from the claims of all parties to this action as upon execution and bring the proceeds into court for further order, and all questions of priority of lien are reserved for the further consideration of this court, and that said sale shall be upon the premises, and that the different parcels be separately appraises, and that the terms of sale shall be either all cash or, at purchaser's option, one-fourth cash and the balance in one, two, and three years, the deferred payments to bear interest from date, payable annually, and be secured by purchase-money mortgage upon the premises sold, and you are authorized to expend a reasonable sum of money for duly advertising the same by posters, hand-bills, &c., and engaging an auctioneer for the same.

We therefore command you that you faithfully execute the above and foregoing order of our said court of common pleas agreeably to the statute of Ohio in such case made and provided, and of your proceedings herein, together with this writ, make due return
87 to our said court according to law.

By order of court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 25 day of February, A. D. 1887.

DANIEL J. DALTON,
Clerk C. C. P., H. C., O.,
By GEO. A. HERWIG, *Deputy.*

(Endorsed on cover:) No. 74375. Hamilton common pleas. Meyer Geggenheimer, plaintiff, against Moritz Loth *et al.*, defendants. Filed April 25, 1887. Daniel J. Dalton, clerk. Order for sale on answer & cross-petition of Wm. Stix to George Sidney Tyler, S. M. C. Returnable according to law. Kebler, Roelker & Jelke, attorneys. Clerk's fees, $3.00. Paid by G. S. Tyler, S. M. C.

88 *Decree of Confirmation and Distribution.*

MEYER GUGGENHEIM
vs.
MORITZ LOTH, FREDERICKA, LOTH, His Wife; ADOLPH Feiss, William Stix, The National Park Bank of New York, a Corporation Duly Created under the Laws of the United States; Bernhard Bettman, Abraham J. Freidlander, Ricka Amburg, The First National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; Elijah Newman, Frederick S. Pinkins, J. D. Hearne, The Third National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; The Commercial Bank of Cincinnati, a Corporation Duly Created under the Laws of Ohio; James Hampden Robb and Charles E. Strong, Trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Adler, Louis Adler, Philip Stromberg, Abraham Reeser, August Vos, George A. Clark, The City of Cincinnati for the Use of Thomas Lloyd, and The City of Cincinnati for the Use of B. D. Barton. } 74375.

On motion of the plaintiff and on his producing the report of the special master commissioner herein of the sale made under the former order of this court and an assignment and conveyance by August Vos, a purchaser at said sale of eighty-two and fifty-nine hundredths (82.59) feet on the west side of Vine street and running back even width one hundred (100) feet, being parts of lots five (5) and six (6) on plat U, made by the commissioners in partition of the estate of Jane and James Findlay in causes No. 9569 and 9570 of the Hamilton county court of common pleas, said lots 5 and 6 being part of block 12, in Findlay and Ludlow's plat, to
89 Bernhard Bettman and Abraham J. Freidlander of all his right, title, and interest in such property as purchaser, and an assignment by August Vos, a purchaser at said sale of the south twenty-five (25) feet of lot 97 and the north thirty-five feet (35) of lot — (98), block 11, of Findlay and Ludlow's subdivision, to Louis Meier of all his right, title, and interest to said property as such purchaser, and the court, on careful examination of the proceedings of said special master commissioner, being satisfied that the same have been had in all respects in conformity to law and the orders of this court, it is ordered that the said proceedings and sale be, and they are hereby, approved and confirmed.

And it is further ordered that the said special master commissioner convey to the said purchaser, William Stix, William Stagge, David C. Tappe, August Vos, and assign*ment* of August Vos, namely, Louis Meier and Bernhard Bettman and Abraham J. Freidlander, by deed in fee simple the lands and tenements so sold, and the court, coming to distribute the proceeds of sale *sale*, amount-

ing to $31,038.82, orders said special master commissioner to pay, first—

1st, the costs of court, $60.00; 2nd, expenses of sale, not including master's fees, $482.93; 3rd, assessment on east alley, $567.68; 4th, taxes, $1,287.62; 5th, to O. B. Jones, attorney for Thomas Lloyd, defendant, $78.21; 6th, master commissioner's fees for said sale, $234.70, and as receiver, $150.00; $384.70 to Henry W. Taylor or Perry & Jenny, attorneys, $8,890.00; 8th, to Robb & Strong, trustees, or Kebler, Roelker & Joelke, attorneys, $11,361.66; 9th, to William Stix or Kebler, Roelker & Jelke, attorneys, $7,926.02; total, $31,038.82.

And the court further orders that George S. Tylor, receiver for rents and profits of property sold, pay to William Stix or
90 Kebler, Roelker & Jelke the balance in his hands as shown by his receiver's accounts, to wit, $833.47, and said account is hereby approved and confirmed.

STATE OF OHIO, }
Hamilton County, } *ss:*

Common Pleas Court.

I, Daniel J. Dalton, clerk of the court of common pleas within and for the county and State aforesaid, do hereby certify the within and foregoing to be a true and correct transcript of the petition, summons and return, answer and cross-petition of Robb & Strong, answer and cross-petition *for* Wm. Stix, answer of Robb & Strong thereto, decree for sale, order of sale, issued Feb'y 25th, 1887, to Geo. Sidney Tylor, S. M. C.; report of master and decree of confirmation, ent. May 19th, 1887, in the case No. 74375, wherein Meyer Guggenheim is plaintiff against Moritz Loth *et al.*, defendants, as appears from the files and records now in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Cincinnati, this 28th day of May, A. D. 1888.

DANIEL J. DALTON,
Clerk of the Common Pleas Court, H. C., O.,
By FRANK D. EBERSOLE, *Dep'ty.*

91 EXHIBIT "B."

Know all men by these presents that Moritz Loth and Frederick Loth, his wife, in consideration of ten thousand dollars and other valuable considerations to them paid by James Hampden Robb and Charles E. Strong, trustees, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said James Hampden Robb and Charles E. Strong and the survivors of them and the heirs and assigns of them and the survivor of them all the following parcels of real estate, all situate in the city of Cincinnati, Hamilton county, Ohio:

92 On the westerly side of Vine street north of Mulberry St., to wit, lots 3, 4, and 5, of 20 feet front each, of the subdivision

of a tract of land beginning at the west side of Vine St. at a line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet and extending back westwardly of the same width 132 feet, commencing for numbers from the south, making five lots of 20 feet front each, said lots 3, 4, and 5 being 60 feet in front on the west side of Vine street, said lots being the same property conveyed by John Shelley to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilton county, Ohio, and also by E. B. Reeder to Moritz Loth by deed recorded in Book 401, page 387, records of deeds of Hamilton county, Ohio.

And also all that other real estate situated in said city of Cincinnati, to wit, all that part of lot marked and numbered 2, block 12, in the plat of subdivision laid out by Gen. James Findlay, J. C. and I. L. Ludlow, recorded in Book 49, page- 420 and 422, as now subdivided by the commissioner- in case of partition of James and John Findlay, which fronts 50 feet on the west side of Vine street, extending westwardly of the same width in rear as in front to the depth of 100 feet; said lot 2, in said block 12, Findlay and Ludlow subdivision, was set off by the Findlay commissioners to John Keene Findley, and was conveyed by said John Keene Findlay to said Morits Loth by deed recorded in Book 358, page 571, of the records of deeds of Hamilton county, Ohio; also all that part of lot 4, in the plat of the subdivision made by Findlay's commissioners of block 12 on the said plat of the subdivision laid out by Findlay and Ludlow, as
93 fronts 50 feet on the west side of Vine St., extending back westwardly of even width in rear as in front to the *the* depth of 100 feet, said 50 feet front on the west side of Vine street by 100 feet deep being the same property set off with the rest of said lot 4 by Findlay's commissioners to James F. Irwin and conveyed by said James F. Irwin to said Morits Loth by deed recorded in Book 389, page 320, of the records of deeds of Hamilton county, Ohio.

Also that certain other lot in the city of Cincinnati aforesaid adjoining the easterly line of the lot last described, fronting 17 feet on the west side of Vine street, running back westwardly of even width in rear as in front to the depth of 100 feet, said lot hereby conveyed being off the westerly part of lot 5 as marked by Findlay's commissioners on the plat of subdivision of block 12 of Findlay and Ludlow's subdivision aforesaid; said lot No. 5 was set off by Findlay's commissioners to William Irwin, the lot hereby conveyed being all that property conveyed to the grantor herein by the Franklin Bank of Cincinnati by deed recorded in Book 401, page 381, of the records of Hamilton county, and all the estate, title, and interest of the said grantors, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the only proper use of the
94 said James Hampden Robb and Charles E. Strong and the survivors of them and the heirs and assigns of them or their survivors of them; and the said Moritz Loth, for himself,

his heirs, executors, and administrators, does hereby covenant with said James Hampden Robb and Charles E. Strong and the survivor of them and the heirs and assigns of them or of the survivor of them that he is the true and lawful owner of the said premises and has full power to convey the same; that the title so conveyed is clear, free, and unincumbered, and, further, that he does warrant and will defend the same against all claim or claims of all persons whomsoever.

In witness whereof the said Moritz Loth and Frederick Loth, his wife, who hereby releases all right and expectency of dower in the said premises, have hereunto set their hands and seals this fifth day of February, in the year of our Lord one thousand eight hundred and eighty-five.

MORITZ LOTH. [SEAL.]
FREDERKE LOTH. [SEAL.]

Signed and sealed in presence of us—
JOHN KEBLER,
FERD. JELKE, JR.

THE STATE OF OHIO, } ss:
County of Hamilton, }

Be it remembered that on the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-five, before me, the subscriber, a notary public in and for said county, personally came Moritz Loth and Frederika Loth, his wife, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

And the said Frederika Loth, wife of the said Moritz Loth, being examined by me separate and apart from her said husband
95 and the contents of said deed being by me made known and explained to her as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith, as her voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal in the day and year last aforesaid.

FERD. JELKE, JR.,
Notary Public, Hamilton Co., Ohio. [SEAL.]

96 EXHIBIT "C."

This lease made this 5th day of February, A. D. 1885, between James Hampden Robb and Charles E. Strong, trustees, parties of the first part, and Moritz Loth, party of the second part, witnesses that said parties of the first part, in consideration of the rents, payments, covenants and conditions herein contained and by said party of the second part to be paid, kept and performed, do hereby grant, demise and lease to the said Moritz Loth, his executors, ad-

ministrators, and assigns all the following-described premises, all situated in the city of Cincinnati, Hamilton county, Ohio.

97 On the westerly side of Vine street north of Mulberry St., to wit: Lots 3, 4, and 5 of 20 feet front each of the subdivision of a tract of land beginning at the west side of Vine St. at a line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet and extending back westwardly of the same width 132 feet commencing for numbers from the south, making five lots of 20 feet front each, said lots 3, 4, and 5 being 60 feet in front on the west side of Vine street, said lots being the same property conveyed by John Shelley to Moritz Loth by deed recorded in Book 401, page 382 of the records of deeds of Hamilton county, Ohio; and also by E. B. Reeder to Moritz Loth by deed recorded in Book 401 page 387, records of deeds of Hamilton county, Ohio.

And also all that other real estate situated in said city of Cincinnati, to wit: All that part of lot marked and numbered 2, block 12, in the plat of subdivision laid out by Gen. James Findlay, J. C. and I. L. Ludlow, recorded in Book 49, page 420 and 422, as now subdivided by the commissioner in case of partition of James and John Findlay, which fronts 50 feet on the west side of Vine street, extending westwardly of the same width in rear as in front to the depth of 100 feet. Said lot 2 in said block 12 Findlay and Ludlow subdivision was set off by the Findlay commissioners to John Keene Findlay, and was conveyed by said John Keene Findlay to said Moritz Loth by deed recorded in Book 358 page 571 of the records of deeds of Hamilton county, Ohio. Also all that part of lot 4, in the plat of the subdivision made by Findlay's commissioners of block 12 on the said plat of the subdivision laid out by Findlay and Ludlow as fronts 50 feet on the west side of Vine St., extending back

98 westwardly of even width in rear as in front to the *the* depth of 100 feet said 50 feet front on the west side of Vine street by 100 feet deep of said lot 4 of *lot* 12 of Findlay & Ludlow's — having been, with the rest of said lot 4, — by Findlay's commissioners to James F. Irwin and conveyed by said James F. Irwin to said Moritz Loth by deed recorded in Book 389, page 320 of the records of deeds of Hamilton county, Ohio.

Also that certain other lot in the city of Cincinnati, aforesaid adjoining the westerly line of the lot last described, fronting 17 feet on the west side of Vine street, running back westwardly of even width in rear as in front to the depth of 100 feet, said lot hereby leased being off the westerly part of lot 5, as marked by Findlay's commissioners on the plat of subdivision of block 12 of Findlay and Ludlow's subdivision, said lot No. 5 was set off by Findlay's commissioners to William Irwin the part hereby leased was conveyed to said Loth by the Franklin Bank of Cincinnati, by deed recorded in Book 401, page 381 of the records of Hamilton county, and all the said lots and parcels of land above described and hereby leased to the party of the second part being all these said lots heretofore conveyed by said M. Loth to the said James Hampden Robb and Charles E. Strong, trustees by deed dated the 5th day of Feb.,

1885 to have and to hold, the same with the appurtenances unto the said party of the second part his executors administrators and assigns from the 5th day of Feb., 1885 for and during the joint lives of Ellen W. Robb and Mary Robb her daughter and the survivor of them until the date of the death of such survivor, said party
99 *party* of the second part yielding and paying therefor unto the parties of the first part and the survivor of them and of the heirs of them and of the survivor of them during the term of the life of said Ellen W. Robb, and for six months after her death, annually and proportionately for any fraction of the year at the rate of $600 a year, payable in half-yearly instalments of $300 cash—first instalment of $300 maturing on August 5th 1885 and also paying to the said parties of the first part and the survivor of them the sum of $5,000, six*th* months after the death of said Ellen W. Robb and also the further sum of $5,000 in case said Mary Robb should be dead at the expiration of said six months—from said Ellen W. Robb's death that in case of said Mary Robb's living at the expiration of said six months from said El-en W. Robb's death moreover paying to said parties of the first part and the survivor of them from and after six months from said Ellen W. Robb's death and after the payment of said $5,000 and of the instalments then due during the lifetime of said Mary Robb yearly, at the rate of $300 per annum, and proportionately for any fraction of a year—payable in half-yearly instalments of $150 each until the death of said Mary Robb and further paying to the said parties of the first part and the survivor of them after the payment of the sums stipulated herein to be paid up to the date of the death of said Mary Robb the additional sum of $5,000 on the date of the death of said Mary Robb.

And the said Moritz Loth for himself, his executors, administrators and assigns, covenants and agrees with said James Hampden Robb and Charles E. Strong, trustees and the survivor of them, and the heirs and assigns of them and of the survivor of them that he will without demand pay during the lifetime of said Ellen W.
100 Robb and for six months after her death the sum of $600 annually and proportionately for a fraction of the year in half-yearly instalments of three hundred dollars each the first half-yearly instalments maturing Aug. 5, 1885 and will also pay the sum of $5,000 six months after the death of said Ellen W. Robb if at that date said Mary Robb be living, but that instead and in place of said $5,000 he will pay the sum of $10,000 six months after the date of the death of said Ellen W. Robb if at that date said Mary be not living; also that in case said Mary Robb survive said Ellen W. Robb he will pay during the lifetime of said Mary Robb annually and proportionately for a fraction of the year the sum of $300 in half-yearly sums of $150 each, the first half-yearly instalment of $150 accruing, to be paid 12 months after the death of said Ellen W. Robb until the date of the death of said Mary Robb, and will also pay the further sum of $5,000 upon the death of said Mary Robb, she having survived said Ellen W. Robb all in manner and form as hereinabove stipulated; also that, he will pay all taxes and

assessments ordinary and extraordinary that may at any time during the life of this lease be levied and charged upon said leased premises at the time that they respectively become due. Also that he will keep the improvements upon said lots and parcels of land at his own expense in as good order and repair as they now are or may hereafter be put into by him, during the life of this lease; and will at his own expense repair and rebuild the same in case of loss or damage by fire or accident or ordinary wear and tear. That he will not do or suffer waste thereon, also that he will at his own expense keep the improvements on said premises insured in the sum of $5,000 in one or more insurance companies approved by said parties of the first part and in their name proceeds *and* in
101 case of loss to be applied toward repairing or rebuilding the same and further for the said payment to be made by said party of the second part and his as*s*signs as here*in*above by him stipulated to be made and for the payment of said taxes and premiums of insurance as above stipulated a lien is hereby received upon the premises hereby leased and the interest of said party of the second part in and to the same, in favor of said parties of the first part and the survivor of them and the heirs, and assigns of them and of the survivor of them prior and preferable to any and all other liens thereupon whatever.

And the said parties of the first part for themselves and the survivor of them and the heirs, executors, administrators and assigns of them and of the survivor of them hereby cov-nant with the said party of the second part his heirs and assigns that all payments hereinabove stipulated to be made by the said party of the second part having been fully paid up—and all taxes, assessments and premiums of insurance—having been fully paid up as hereinabove agreed by the said party of the second part and all the covenants and agreements in this lease contained — be performed by said party of the second part having been fully performed by said party of the second part, they will convey the said leased premises to the said party of the second part his heirs, or assigns by deed of special warranty, warranting only against encumbrances by them made.

Provided, however, and this lease is made upon this condition, that if said party of the second part, his heirs, executors, administrators or assigns, shall fail to make the payments hereinabove stipulated to be made by said party of the second part, or any or either of them as the same or any or either of them may
102 accrue to be paid as above stipulated or within thirty days thereafter and without demand made therefor, or shall fail to pay said taxes, assessments and premiums of insurance according to the stipulations hereinabove made, or shall fail to keep & perform any of the covenants and agreements by the said party of the second part to be kept and performed as above stipulated, it shall be lawful, immediately after such default or breach of covenant, for the said parties of the first part and the survivors of them and the heirs and assigns of them and the survivor of them *u*nto said premises to re-enter and the same to have again, repossess and enjoy as in their first and former estate and thereupon this lease and

everything contained therein by the said parties of the first part to be done shall cease and determine on their part and at their option.

In witness whereof the said James Hampden Robb and Chas. E. Strong, trustees, the parties of the first part, and Moritz Loth, party of the second part, have hereunto set their hands and seals this February 5th, 1885.

MORITZ LOTH. [SEAL.]
J. HAMDEN ROBB. [SEAL.]
CHAS. E. STRONG. [SEAL.]

Signed, sealed, and acknowledged in presence of—
FERD. JELKE,
JOHN KEBLER,
As to M. Loth.
ROBERT STURGIS,
L. G. HAN,
As to J. Hampden Robb & Chas. E. Strong.

103 STATE OF OHIO, } ss:
Hamilton County, }

Be it remembered that on the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-five, before me, the subscriber, a notary public in and for said county, personally came Moritz Loth, one of the parties named in the foregoing lease, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

FERD. JELKE, JR,
Notary Public, Hamilton Co., Ohio. [SEAL.]

STATE OF NEW YORK, } ss:
City and County of Albany, }

Personally appeared before me, the undersigned, a notary public in and for said city and county of Albany, State of New York, James Hampden Robb, one of the parties in the foregoing lease, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the purposes therein set forth.

Witness my hand and seal of office this 16th day of May, 1885.

WILLIAM JOHNSON,
Notary Public, Albany Co., N. Y.

104 EXHIBIT D.

George Sidney Tylor, special M. C., to August Vos. } Deed.

Whereas on the 13th day of November A. D. 1885, Meyer Gugenheimer plaintiff filed a certain petition in the common pleas court

of Hamilton county, Ohio, against Moritz Loth, Fredericka Loth, his wife, Adolphus Feiss, William Stix, The National Park Bank of New York, a corporation duly created under the laws of the United States, Bernhard Bettermann, Abraham J. Friedlander, Ricka Amberg, The First National Bank of Cincinnati, a corporation duly created under the laws of the United States, Elijah Neuman, Frederick S. Pinkus, Otto Jaffe and Frederick S. Pinkus, as O. Jaffe & Pinkus, J. D. Hearne, The Third National Bank of Cincinnati, a corporation duly created under the laws of the United States, The Commercial Bank of Cincinnati, a corporation, duly created under the laws of Ohio, James Hampden Robb and Charles E. Strong, trustees, Henry W. Taylor, Bertha Mann, Fannia Mann, Henry Adler, Louis Adler, Philip Stromberg, Abraham Reeser, August Vos, George A. Clark & Co. The City of Cincinnati for the use of Thomas Lloyd, and The City of Cincinnati, for the use of D. B. Barton defendants and numbered on the docket of said court, as case No. 74375, praying therein among other things for the setting aside of certain deeds on the ground that they were mortgaged and for the sale of certain real estate in said petition and hereinafter described and for the satisfaction thereby of a judgment previously obtained by said Meyer Gugenheimer, against said Moritz Loth and whereas afterwards to wit, on the 7th day of December A. D. 1885, William Stix filed his answer and cross-petition setting
105 out a mortgage by the said Moritz Loth to the said William Stix, of certain real estate hereinafter described and praying that his interest in said premises be protested and whereas afterwards to wit, on the 24th day of July A. D. 1886 the said William Stix filed his answer and supplemental answer, and cross-petition stating among other things, that the said Moritz Loth, was indebted to the said William Stix, in the sum of ten thousand dollars ($10,000,) with 7 per cent. interest from June 30, 1886, on a promissory note, and in the sum of one hundred and seventy-five dollars ($175.00) on each of three interest notes upon the said promissory note and setting out a mortgage deed securing said notes of real estate hereinafter described and asking for the sales of said real estate and that the proceeds thereof be applied first to the payment of the judgment to be rendered in favor of the defendant William Stix ; and whereas afterwards to wit, on Feb. 15, in the January term A. D. 1887, of said court a decree was entered in the journal thereof finding that there is due to said William Stix from said Moritz Loth upon four notes, the sum of ten thousand nine hundred and five dollars and fifty-six cents ($10,905.56) with 7 % interest from the third day of January 1887 payable quarterly and further that said Moritz Loth, executed and delivered to said William Stix, a mortgage dated March 30, 1885 upon the real estate hereinafter described and that the condition of said mortgage has been broken and that William Stix is entitled to have the equity of redemption of defendants Moritz Loth and Fredericka Loth his wife in said mortgaged premises foreclosed and to have said premises sold for the amount due him and therein it is further ordered with the consent of Henry W. Taylor and

Chas. E. Strong, and James Hampden Robb, trustees, that the
106 fee-simple title in the premises described in said mortgage to William Stix be sold and said premises be sold freed from the claims of Henry W. Taylor and Charles E. Strong, and James Hampden Robb, trustees and also other parties to this suit, their respective rights in and to said premises, being transferred to and reserved in the proceeds of such sale and it further ordered that unless the said defendants, Moritz Loth and Fredericka Loth his wife, should pay the cost of said suit and pay to the said William Stix or his attorneys Kebler Roelker & Jelke the sum of $10,905.56 with interest at 7 % from the third of January 1887, payable quarterly, within five days from the entry of said decree, said premises should be sold and an order of court should issue therefor to George Sidney Tylor, special master commissioner of said court to sell either for cash or for one-fourth cash and the balance in one, two and three years at purchaser's option as upon execution, (among other premises) the real estate hereinafter described and to return his proceedings to said court, and whereas on the 25th day of February 1887, in pursuance of said decree and in accordance therewith an order for sale issued from said court in said cause directed to said George Sidney Taylor special master commissioner commanding him to execute the said order and of his proceedings to make due return.

And whereas I, George Sidney Tylor, special master commissioner as aforesaid having caused said premises to be appraised and having advertised the time and place of selling the same in the Cincinnati Commercial Gazette a newspaper printed in the English language and in the Cincinnati Daily Volkblatt a newspaper printed in the German language and both of general circulation in
said county for the period of thirty days prior to the day of
107 sale and otherwise complied with the said order and the provisions of the statute in relation to such cases did on the 16th day of April A. D. 1887, on the premises at 2 o'clock p. m. expose to sale at public auction the premises hereinafter described and thereupon August Vos, did bid for the said premises, the sum of $9,100.00 being the highest and best bid offered for the same and two-thirds of the appraised value thereof the said premises were then and there struck off to the said purchaser and whereas the said court at the May term 1887, having examined the proceedings aforesaid in the premises under said order of sale and being satisfied that the sale aforesaid had been made in all respects in pursuance of said judgment and order of sale and in accordance to the requisitions of the statute regulating such sales did order that the said sale should be confirmed and that the said George Sidney Taylor, special master commissioner should convey to the said purchaser, August Vos by deed in fee simple the premises so sold.

Now know ye that I the said George Sidney Tylor special master commissioner as aforesaid by virtue of said premises and of the power in me vested by the statute for such case made and provided and for and in consideration of the sum of $9,100.00 which I acknowledge to have received from the purchaser August Vos above named do hereby sell and convey unto him the said August Vos

his heirs and assigns forever the said real estate in the city of Cincinnati, county of Hamilton and State of Ohio, and more particularly described as follows, to wit:

108 Lots marked and numbered three (3) four (4) five (5) of twenty feet front (20 ft.) each of the subdivision of the tract of land beginning on the west side of Vine street north of Mulberry street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay thence running south on Vine street one hundred (100) feet and extending back west same width one hundred and thirty-two (132) feet commencing for numbers from the south making five lots of twenty (20) feet front each said lots three, four, and five herein described being 60 feet in front on the west side of Vine street—and being the same conveyed to said Moritz Loth by John Shelley by deed in Book 201, page 382 Hamilton county records together with all the privileges and appurtenances thereto belonging and all the estate, title and interest of the said Moritz Loth and of all the other parties to the said suit, as far as by law provided of in and to the same. To have and to hold the premises aforesaid unto the said August Vos his heirs and assigns forever as fully and completely as I George Sidney Tylor, master commissioner aforesaid by virtue of said judgment order of sale, sale and confirmation and of the statute made and provided for such cases may can or should convey the same.

In witness whereof, I have hereunto set my hand and seal the 24th day of May A. D. 1887.

GEORGE SIDNEY TYLOR,
Special Master Com. [SEAL.]

Signed and sealed in presence of us—
W. AUSTIN GOODMAN.
W. HOOPER.

109 STATE OF OHIO, }
County of Hamilton, } *ss:*

Personally appeared before me, W. Austin Goodman, a notary public in and for said county, the above-named George Sidney Tylor, special master commissioner, the grantor in the above deed of conveyance, and as such acknowledged the signing and sealing of the same to be his voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal this 24th day of May, A. D. 1887.

W. AUSTIN GOODMAN,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

Receiv-d for record May 28, 1887, at 2.10 o'clock p. m.

109½ THE STATE OF OHIO, } ss:
Hamilton Co,. }

RECORDER'S OFFICE.

I, John Hagerty, recorder within and for the county aforesaid, do hereby certify the foregoing to be a true and correct copy — deed from George Sidney Tylor, spe. master commissioner, to August Vos.

Received and recorded on the 28 day of May, 1887, in Book No. 635, page 45, Hamilton county, Ohio, records.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Cincinnati, this 2nd day of June, A. D. 1888.

JOHN HAGERTY, *Recorder.* [SEAL.]

110 EXHIBIT E.

Moritz Loth, per com'r, }
— } Deed.
William Stix. }

Whereas on the 13th day of November A. D. 1885, Meyer Gugenheimer plaintiff filed a certain petition in the common pleas court of Hamilton county, Ohio against Moritz Loth, Fredericka Loth, his wife, Adolphus Feiss, William Stix, The National Park Bank of New York, a corporation duly created under the laws of the United States, Bernhard Bettermann, Abraham J. Friedlander, Rieka Amberg The First National Bank of Cincinnati, a corporation duly created under the laws of the United States, Elijah Neuman, Frederick S. Pinkus, Otto Jaffe and Frederick S. Pinkus, as O. Jaffe & Pinkus, J. D. Hearne, The Third National Bank of Cincinnati a corporation duly created under the laws of the United States, The Commercial Bank of Cincinnati, a corporation duly created under the laws of Ohio, James Hampden Robb and Charles E. Strong, trustees, Henry W. Taylor, Bertha Mann, Fannia Mann, Henry Adler, Louis Adler, Philip Stromberg, Abraham Reeser, August Vos, George A. Clark & Co. The City of Cincinnati for the use of Thomas Lloyd, and The City of Cincinnati, for the use of D. B. Barton defendants and numbered on the docket of said court, as case No. 74375, praying therein among other things for the setting aside of certain deeds on the ground that they were mortgaged and for the sale of certain real estate in said petition and hereinafter described and for the satisfaction thereby of a judgment previously obtained by said Meyer Gugenheimer, against said Moritz Loth and whereas afterwards to wit, on the 7th day of December A. D. 1885, William Stix filed his answer and cross-petition setting out a mortgage by the said Moritz Loth
111 to the said William Stix, of certain real estate hereinafter described and praying that his interest in said premises be protested and whereas afterwards to wit, on the 24th day of July A. D. 1886 the said William Stix filed his answer and supplemental answer, and cross-petition stating among other things, that the said Moritz Loth, was indebted to the said William Stix, in the sum of

two thousand dollars ($10,000) with 7 per cent. interest from June 30, 1886, on a promissory note, and in the sum of one hundred and seventy-five dollars ($175.00) on each of three interest notes upon the said promissory note and setting out a mortgage deed securing said notes of real estate hereinafter described and asking for the sales of said real estate and that the proceeds thereof be applied first to the payment of the judgment to be rendered in favor of the defendant William Stix; and whereas afterwards to wit, on Feb. 15, in the January term A. D. 1887, of said court a decree was entered in the journal thereof finding that there is due to said William Stix, from said Moritz Loth upon four notes, the sum of ten thousand nine hundred and five dollars and fifty-six cents ($10,905.56) with 7 % interest from the third day of January 1887 payable quarterly and further that said Moritz Loth, executed and delivered to said William Stix, a mortgage dated March 30, 1885 upon the real estate hereinafter described and that the condition of said mortgage has been broken and that William Stix is entitled to have the equity of redemption of defendants Moritz Loth and Fredericka Loth his wife in said mortgaged premises foreclosed and to have said premises sold for the amount due him and therein it is further ordered with the consent of Henry W. Taylor and Chas. E. Strong, and James Hampden Robb, trustees, that the fee-simple title in the premises described in said mortgage to William Stix be sold and said premises be sold freed from the claims of Henry W. Taylor and Charles E. Strong, and James Hampden Robb, trustees and also other parties to this suit, their respective rights in and to said premises, being transferred to and reserved in the proceeds of such sale and it — further ordered that unless the said defendants, Moritz Loth and Fredericka Loth his wife, should pay the cost of said suit and pay to the said William Stix or his attorneys Kebler Roelker & Jelke the sum of $10,905.56 with interest at 7 % from the third of January 1887, payable quarterly, within five days from the entry of said decree, said premises should be sold and an order of court should issue therefor to George Sidney Tylor, special master commissioner of said court to sell either for cash or for one-fourth cash and the balance in one, two and three years at purchaser's option as upon execution, (among other premises) the real estate hereinafter described and to return his proceedings to said court, and whereas on the 25th day of February 1887, in pursuance of said decree and in accordance therewith an order for sale issued from said court in said cause directed to said George Sidney Taylor special master commissioner as aforesaid commanding him to execute the said order and of his proceeding to make due return.

112

And whereas I, George Sidney Tylor, special master commissioner as aforesaid having caused said premises to be appraised and having advertised the time and place of selling the same in the Cincinnati Commercial Gazette a newspaper printed in the English language and in the Cincinnati Daily Volkblatt a newspaper printed in the German language and both of general circulation in said

county for the period of thirty days prior to the day of sale
113 and otherwise complied with the said order and the provisions of the statute in relation to such cases did on the 16th day of April A. D. 1887, on the premises at 2 o'clock p. m. expose to sale at public auction the premises hereinafter described and thereupon William Stix, did bid for the said premises, the sum of nine thousand five hundred and fifty-six and $\frac{32}{100}$ dollars ($9,556.32) being the highest and best bid offered for the same and two-thirds of the appraised value thereof the said premises were then and there struck off to the said purchaser and whereas the said court at the May term 1887, having examined the proceedings aforesaid in the premises under said order of sale and being satisfied that the sale aforesaid had been made in all respects in pursuance of said judgment and order of sale and in accordance to the requisitions of the statute regulating such sales did order that the said sale should be confirmed and that the said George Sidney Taylor, special master commissioner should convey to the said purchaser, William Stix, by deed in fee simple the premises so sold.

Now know ye that I the said George Sindey Tylor special master commissioner as aforesaid by virtue of said premises and of the power in me vested by the statute for such case made and provided and for and in consideration of the sum of nine thousand five hundred and fifty-six and $\frac{32}{100}$ —($9,556.32) which I acknowledge to have received from the purchaser William Stix above named do hereby
sell and convey unto him the said William Stix, his heirs
114 and assigns forever the said real estate in the city of Cincinnati county of Hamilton and State of Ohio and more particularly described as follows, to wit:

Being part of lot seven (7) on plat "W" made by the commissioners in partition of the estate of James and Jane Findlay, in cause No. 9569 and 9570 of the Hamilton county court of common pleas as recorded in volume 222 of said record said lot 7 being part of block 12 in Findlay & Ludlow's plat recorded in Deed Book 49 page 420 Hamilton county records, the part of lot 7 herein conveyed being described as follows to wit; forty-four (44) feet more or less on the west side of Vine street; part of lot 7 aforesaid being all the space between the southerly line of lot formerly owned by M. Plunkett and the north line of lot 6, and running back west along the line of lot 7 ninety feet in depth being narrower in rear than in front, also the following-described real estate in the city of Cincinnati county of Hamilton and State of Ohio, viz; all that part of lot two (2) block 12, on the plat of subdivision laid out by General James Findlay and J. C. & I. L. Ludlow recorded in Book 49, pages 420 to 422 inclusive Hamilton county record, as said block 12 is now subdivided by commissioners in partition of the estate of James and Jane Findlay which fronts fifty feet on the west side of Vine street and extending back westwardly of the same width in rear as in front one hundred (100) feet, said lot two having been set off by said Findlay's commissioners to John King Findlay and conveyed by s-id J. K. Findlay to Moritz Loth by deed in Book 358 page 571, Hamilton county records, also all that real

estate in the city of Cincinnati county of Hamilton and State of Ohio described as follows, viz; all that part of lot four (4) on the plat of subdivision made by said Findlay's commissioner on
115 block 12 on said subdivision made by Findlay and Ludlow, as fronts fifty feet on the west side of Vine street extending back west of even width in rear as in front one hundred (100) feet all of said lot four having been set off by said Findlay's commissioner to James F. Irwin and by him conveyed to said Moritz Loth by deed recorded in Deed Book 389 page 320, Hamilton county *county* records; also the following *the following* described real estate in the city of Cincinnati, county of Hamilton and State of Ohio, viz: Being the premises adjoining the easterly line of the last lot described fronting seventeen and forty-one hundredths (17.41) feet on the west side of Vine street and running back of even width in rear as in front one hundred (100) feet said (17.41) being off the west part of lot five (5) as marked by Findlay's commissioner on a plat of subdivision of block 12, of Findlay and Ludlow's subdivision. Said lot five being set off by said commissioners to William Irwin and the 17.04 feet herein described being conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed recorded in Book 401 page 381 Hamilton county records.

Together with all the privileges and appurtenances thereto belonging and all the estate title and interest of the said Moritz Loth and of all the other parties to said suit as far as by law provided of in and to the same. To have and to hold the premises aforesaid unto the said William Stix, his heirs and assign- forever as fully and completely as I George Sidney Tylor, spe. mas. commissioner aforesaid by virtue of said judgment order of sale, sale and confirmation and of the statute made and provided for such case may, can or should convey the same.

In witness whereof I have hereunto set my hand and seal the 24th day of May A. D. 1887.

GEORGE SIDNEY TAYLOR,
Special Mas. Com. [SEAL.]

116 Signed sealed and acknowledged and delivered in presence of us—
FERDINAND JELKE, JR.
CHAS. A. KEBLER.

STATE OF OHIO, }
County of Hamilton, } *ss:*

Personally appeared before me, —— ——, notary public in and for said county, the above-named George Sidney Tylor, special master commissioner, the grantor in the above deed of conveyance, and as such acknowledged the signing and sealing of the same to be his voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal this 24th day of May, A. D. 1887.

——— ———,

[SEAL.] *Notary Public, Hamilton County, Ohio.*

Receiv-d for record May 2, 1887, at — o'clock p. m.

116½ THE STATE OF OHIO, *Hamilton Co.,* } *ss:*

RECORDER'S OFFICE.

I, John Hagerty, recorder within and for the county aforesaid, do hereby certify the foregoing to be a true and correct copy — deed Moritz Loth, per com., — William Stix.

Received and recorded on the 26 day of May, 1887, in Book No. 630, page 556, Hamilton county, Ohio, records.

In testimony whereof I have hereunto set my hand and affixed my official seal at Cincinnati this 1st day of June, A. D. 1888.

JOHN HAGERTY, *Recorder.* [SEAL.]

117 And afterwards, to wit, on the 2nd day of July, A. D. 1888, the following appearance was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance of August Vos by Attorney.

SOUTHERN DISTRICT OF OHIO:

United States Circuit Court.

JAMES HAMPDEN ROBB *et al.* *vs.* AUGUST VOS *et al.* } No. 4148.

To Benjamin R. Cowen, clerk of said court:

I hereby enter appearance on behalf of August Vos, one of the defendants herein.

A. B. HUSTON,
His Solicitor.

And afterwards, to wit, on the 17th day of July, A. D. 1888, came the marshal of the district aforesaid and filed in the clerk's office of said court the following certified entry, with his proceedings had endorsed thereon in the words and figures following, to wit:

118 UNITED STATES OF AMERICA, *Eastern Division of the Eastern Judicial District of Missouri,* } *ss:*

I hereby certify that I executed the within order or process by delivering a true copy thereof to Miss Minnie Beggman, a woman over sixteen years old (say between 25 & 30 years old), who represented herself to be a member of the family and manager of the residence and usual place of abode of said within-named William Stix, and

so served at and in said residence of said William Stix, at number 3135 Washington avenue, in the city of St. Louis, in my said eastern district of Missouri, neither said Wm. Stix nor his wife having been found in my said district.

Fees, total, $3.18.

JOHN W. EMERSON,
U. S. Marshal,
[SEAL.] By WALTER ATKINSON, *Deputy.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

Walter Atkinson, deputy U. S. marshal, being sworn, says the annexed return *as* true.

WALTER ATKINSON.

119 Subscribed and sworn to before me this 16th day of July, 1888.

A. P. SELBY,
Clerk of the United States Circuit Court, Eastern Division, Eastern Judicial District of Missouri. [SEAL.]

And afterwards, to wit, on the 26th day of July, A. D. 1888, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of Wm. Stix.

Circuit Court of the United States for the Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and Others
vs.
AUGUST VOS *et al.* } No. 4148.

Answer of William Stix.

William Stix, now and at all times hereafter reserving all manner of benefit and advantage to himself of exception to the many errors and insufficiencies in the bill herein contained, and not admitting, but denying, that the acts done by Chas. A. Kebler and the firm of Kebler & Roelker in said bill mentioned were done without the knowledge or consent of these complainants, and asserting that they were done with the knowledge and consent and at the
120 request of complainants, for answer to said bill says that any alleged want of authority on the part of said Chas. A. Kebler or said firm of Kebler & Roelker to do any and all of the acts by him or said firm done and in the bill mentioned was supplied and all acts by him or said firm done and in the bill mentioned purporting to be done on behalf of complainants were ratified by complainants, in that complainants, on March 2nd, 1888, in the court of common pleas of Hamilton county, in the case of Wm. J. Coppoc*l*,

adm'r, against John Kebler *et al.*, which cause was numbered 79812 on the docket of said court, voluntarily entered their appearance and filed their answer and cross-petition, and again on April 10, 1888, in said court, in the case of William J. Coppock, administrator, against John Kebler *et al.*, which case was numbered 79902 on the docket of said court, voluntarily entered their appearance and filed their answer and cross-petition, the answer and cross-petition in each of said cases being in the same language and in each case averring that said Charles A. Kebler, for his firm of Kebler & Roelker, had duly appeared for these complainants in the action brought by one Gugenheim and in the bill herein fully described; that the proceeds of the interest and estate of these complainants in the bill described had, in said action brought by said Gugenheim, been paid to Charles A. Kebler or the firm of Kebler & Roelker, and praying that said Roelker, as surviving partner of said firm, and said William J. Coppock, as administrator of the estate of said Charles A. Kebler, should be ordered and decreed to pay them the amount of said proceeds so realized and received; all of which fully appears from said answer and cross-petition, a copy of which is hereto attached, marked Exhibit A; all which matters and things this defendant is
121 ready to prove as this court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

Should this court find the alleged acts of said Kebler and his firm were not binding on complainants, then this defendant prays to be allowed to redeem the property purchased by him on such terms as this court may direct, inasmuch as this defendant charges the fact to be that the deed from Moritz Loth to the complainants and the lease from them to him together constituted and were by the parties intended to be a mortgage to secure the repayment of ten thousand dollars and interest thereon by complainants loaned to said Moritz Loth.

WILBY & WALD,
Solicitors for William Stix.

Copy.

Hamilton County, Ohio, Court of Common Pleas.

WM. J. COPPOCK, Admis. of Chas. A. Kebler, Dec'd, Plaintiff, *vs.* JOHN KEBLER *et al.*, Defendants.	No. 79902.

The Answer and Cross-petition of James Hampden Robb and Charles E. Strong, Trustees.

These defendants, coming into court and entering their ap-
122 pearance herein and waiving the issuing and service of process herein, by way of answer says that they are not informed as to the truth of the matters and things in the petition and in the several answers and cross-petitions set out, and therefore deny the same ex-

cept in so far as they are hereinafter expressly admitted; and for cross-petition herein these defendants say that heretofore, to wit, on the 15th day of March, 1885, *there* were seized in their demain in fee of the following-described real estate, situated, lying, and being in the city of Cincinnati, Hamilton county, Ohio, and described as follows:

Lying on the westerly side of Vine St. north of Mulberry St., to wit, lots No. 3, 4, and 5, 20 feet front each, of the subdivision of a tract of land beginning on the west side of Vine St. at a line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine St. 100 feet and extending back westwardly of same width 132 feet, commencing for numbers from the south, making five lots of 20 feet front each, said lots 3, 4, and 5 then belonging to these plaintiffs, being 60 feet in front on the west side of Vine St., said lots being the same property heretofore conveyed by John Shelly to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilton county, Ohio, and also by E. B. Reeder to Moritz Loth by deed recorded in Book 401, page 387, records of deeds of Hamilton county, Ohio.

And also all that other real estate situated in said city of Cincinnati, to wit, all that part of lot marked and numbered 2, block 12, in the plat of subdivision laid out by Gen. James Findlay, J. C. and I. L. Ludlow, recorded in Book 49, page 420 and 422, as now
123 subdivided by the commissioners in the case of partition of James and John Findlay, which fronts 50 feet on the west side of Vine street and extending westwardly of the same width in the rear as in front to the depth of 100 feet; *at* lot 2, in said block 12, Findlay and Ludlow subdivision, was set off by the Findlay commissioners to John Keen Findlay and was conveyed by said John Keene Findlay to said Moritz Loth by deed recorded in Bock 358, page 571, of the records of deeds of Hamilton county, Ohio; also all that part of lot number 4, in the plat of the subdivision made by Findlay's commissioners of block 12 on the said plat of subdivision laid out by Findlay and Ludlow, as fronts 50 feet on the west side of Vine street, extending back westwardly of even width in rear as in front to the depth of 100 feet, said 50 feet front on the west side of Vine street by 100 feet deep being the same property set off with the rest of said lot 4 by Findlay's commissioners to James F. Irwin and conveyed by James F. Irwin to Moritz Loth by deed recorded in Book 389, page 320, of the records of Hamilton county, Ohio; also that other certain lot in the city of Cincinnati aforesaid adjoining the westerly line of the lot last described, fronting 17 feet on the west side of Vine St., running back westwardly of even width in the rear as in the front to the depth of 100 feet, said lot being 17 feet of the westerly part of lot 5 as marked by Findlay's commissioners on the plat of subdivision of block 12 of Findlay and Ludlow's subdivision aforesaid, the said lot being the property hereinafter conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed recorded in Book 401, page 381, of the records of deeds of Hamil-

ton county, Ohio, and that the said premises were occupied by one Moritz Loth under and by virtue of a lease from these de-
124 fendants for the term of 99 years, renewable forever, and that in said lease there was a provision whereby said Moritz Loth had the right and privilege of purchasing said premises at and for the price and sum of $10,000.

And these defendants further say that on said day one Meyer Gugenheim, having recovered by the consideration of this court a judgment against the said Moritz Loth, brought suit in this court, case No. — in this court, against the said Moritz Loth, and the defendants and divers other persons, praying, among other things, that these defendants may be declared to hold said lands by way of mortgage as security for the said purchase price on said lands of $10,000, and that said lands might be free from the claim of these defendants and all other persons parties thereto to satisfy the said judgment of the said Meyer Gugenheim and the claims of divers persons therein made defendants.

And these defendants further say that thereafter, to wit, on the 18th day of December, 1885, Chas. A. Kebler and Frederick G. Roelker, then partners engaged in the practice of the law under the firm name and style of Kebler & Roelker, of the city of Cincinnati, entered the appearance of these defendants in such cause and filed an answer therein on behalf of these defendants; further say there-*fore*, to wit, upon the 10th day of May, 1887, said firm of Kebler & Roelker was dissolved and Chas. A. Kebler, Frederick G. Roelker, and Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of law in the city of Cincinnati under the firm name and style of Kebler, Roelker & Jelke, as the successors of said firm of Kebler & Roelker, and these defendants say that thereafter all steps in said cause on behalf of these defendants were taken by said firm of Kebler, Roelker & Jelke, and by none others, and these defendants further say that such proceedings were afterwards had in said cause that the said premises were sold, free of the claims of
125 these defendants and of all other persons whoever, by one George Sidney Tylor, who was appointed special master commissioner by this court in said cause for the purpose of making such sale, and *said* proceedings were thereafter had in said cause that a decree was made in said cause on the 19th day of May, 1887, whereby it was ordered, adjudged, and decreed that said George Sidney Tylor, special master commissioner in said cause, pay to these defendants or their counsels, Kebler, Roelker and Jelke, out of the proceeds of said sale the sum of $11,361; and these defendants further say that said sum was duly paid on the 16th day of June, 1887, to said firm of Kebler, Roelker & Jelke by said George Sidney Tylor, special master commissioner, as ordered by the decree of said court, and that *that* no portion thereof has been paid to these defendants or accounted for to them, and these defendants further say that since which time, to wit, on the 23rd day of Nov., 1887, Chas. A. Kebler departed this life, and that Frederick G. Roelker and Ferdinand Jelke, Jr., are the surviving partners of said firm. Wherefore these defendants pray that said Ferdinand Jelke, Jr.,

may be made party defendant hereto and that it may be adjudged that these defendants are creditors of said firm of Kebler, Roelker & Jelke, and that the property in the petition and cross-petition of Frederick G. Roelker sought to be sold may be sold, and that out of the proceeds thereof said sum $11,361, with interest from the 16th day of June, 1887, may be paid to these defendants, and that these defendants may recover judgment against Frederick G. Roelker and Ferdinand Jelke, Jr. as surviving partners of Kebler, Roelker & Jelke, for said sum of $11,361, with interest from the 16th day of June, 1887, and for their costs.

(Signed) HARMON, COLSTON, GOLDSMITH & HOADLY,
Att'ys for Robb & Strong, Defendants.

126 STATE OF NEW YORK, }
County and City of New York, } *ss:*

Before me, the undersigned, a commissioner for the State of Ohio, appointed for and resident within the city and county of New York, personally appeared J. Hampden Robb, to me personally well known, and, being duly sworn, makes oath and says that he is one of the defendants whose answer and cross-petition is contained in the above writing, and that he has read the contents of the above foregoing answer and cross-petition and he is familiar therewith, and that he believes the same to be true.

—— ——.

In testimony whereof I have hereunto set my hand and official seal as such commissioner this — day of ——, 1888.

—— ——.

And afterwards, to wit, on the 26th day of July, A. D. 1888, the following waiver was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Waiver of Verification.

127 Circuit Court of the U. S., So. District of Ohio, *ss:*

JAMES HAMPDEN ROBB *et al.* }
vs.
AUGUST VOS *et al.* }

Verification of answer in this cause of William Stix defendant is hereby waived.

HARMON, COLSTON, GOLDSMITH & HOADLY, *Solicitors for Plaintiff.*

And afterwards, to wit, on the 2nd day of August, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer of August Vos.

Circuit Court of the U. S., S. D. O., Western Division.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS *et al.*

Demurrer of August Vos, one of the defendants.

The defendant August Vos, by protestation, not confessing or acknowledging all or any of the matters or things in and by the bill of complaint of the complainants, James Hampden Robb and Charles E. Strong, trustee-, set forth and complained of to be true in manner and form as the same are therein set forth and alleged, saith he is advised by his counsel that there is no matter or thing in the said bill contained good and sufficient in law to call this defendant in question in this honorable court for the same, but that there is good cause of demurrer thereunto, and therefore this defendant saith that the complainants' said bill, in case the allegations therein con-
128 tained were true, which this defendant doth in no sort admit, contains not any matter of equity wherein this court can ground any decree or give the complainants any relief or assistance as against him, this defendant.

Wherefore, and for divers other errors and imperfections in the said bill appearing, this defendant doth demur in law thereunto, and humbly demands the judgment of this honorable court whether he shall be compelled to put in any further or other answer to the said bill, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

A. B. HUSTON AND
W. AUSTIN GOODMAN,
Solicitors for August Vos, Defendant.

A. B. HUSTON, *Of Counsel.*

And afterwards, to wit, on the same day, to wit, the 2nd day of Aug., A. D. 1888, the following certificate, &c., was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Certificate of Counsel and Affidavit of August Vos, &c.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS *et al.*

I hereby certify that in my opinion the demurrer of defendant August Vos to the bill of complaint in above cause is well founded in point of law.

A. B. HUSTON,
Of Counsel for said August Vos.

August 2, 1888.

129 UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division. }

STATE OF OHIO, }
Hamilton Co., } *ss:*

August Vos, the above-named defendant, being duly sworn, says that his demurrer to the bill of complaint in above cause is not interposed vexatiously or for delay.

AUGUST VOS.

Sworn to and subscribed before me this 2nd day of August, A. D. 1888.

FRANK C. WALTZ,
Notary Public, Hamilton County, Ohio. [SEAL.]

40c. due notary.

And afterwards, to wit, on the 28th day of August, A. D. 1888, the following opinion of Judge Hammond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge Hammond.

130 United States Circuit Court, Southern District of Ohio, Western Division.

JAMES HAMPTON ROBB and CHARLES E. STRONG, Trustees, Complainants,
vs.
AUGUST VOS, WILLIAM STIX, and MORITZ LOTH, Respondents.
} In Chancery. No. 4148.

AUGUST 28, 1888.

HAMMOND, *J.:*

The demurrer in this case must be overruled. As to the jurisdiction of the court, it is very clear that it cannot be defeated on the ground that the purpose of the bill is to set aside, as if upon error or appeal or some such review, the decrees of a State court for irregularities or the like, nor for any equitable consideration for which a court of competent jurisdiction might grant a new trial as at law for some fraud, accident, or mistake entitling a party to such relief. It is not that kind of a bill, but is one attacking the title of the defendants to certain real estate which it is alleged they have procured by a fraudulent judicial proceeding. The relief
131 asked could leave the proceedings of the State court intact as judicial proceedings, and it is not necessary in granting effective relief to interfere with them in the sense of setting aside the decrees by directing that they should be vacated or correction in whole or in part, as under some circumstances a State court of equity might do, if essential to be done, but as to which this court could not act upon the records of a State court. All that need be done is to enjoin the defendants from asserting their alleged fraudulent title against the paramount title of the plaintiffs because of

the alleged frauds in procuring that title. This is just as effective as vacating the decree could be, but yet it is not, technically, vacating the decree in the sense already mentioned. That this jurisdiction exists to prevent the parties from relying on a fraudulent title procured by judicial proceedings, in whatever court they may have been taken, is beyond question. A State court of equity could so act as to titles procured through fraudulent proceedings in a Federal court and so may the Federal courts as to those acquired in the State courts. If the parties and property were in a foreign court the relief would also be avoidable.

Says Mr. Justice Bradley in Johnson *v.* Waters, 111 U. S., 640, 667: "The court of chancery is always open to hear complaints against fraud, whether committed in pairs or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court, but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud
132 in obtaining a judgment or decree it will deprive them of the benefit of it and of any inequitable advantage which they have derived under it."

Nor is the ground of demurrer well taken that the court has no jurisdiction because the plaintiffs have an adequate remedy at law. Briefly the bill alleges that the plaintiffs were the owners of certain valuable real estate which was in possession of certain tenants under a lease for the life of two persons for whom the plaintiffs are trustees, with peculiar covenants not necessary to here mention; those tenants for the life of another being involved, their judgment creditors sought by the judicial proceedings aforesaid to subject their interest in the land to their debts, and had the right to do this.

But one Kebler, an attorney-at-law, conceived the scheme of using those proceedings to devest the plaintiffs, the trustees, of their interest in the land by its sale, he embezzling the proceeds, which he did. These trustees were parties to the record, and Kebler without their knowledge or consent made an unauthorized and fraudulent appearance, filed a cross-bill for them and consented to the sale of the real estate, devested on their interest, he pocketing the money. He had no authority, express or implied, to appear for them and they never heard of the transaction until after the sale. The defendants were the purchasers and this bill seeks to avoid the title so acquired.

It is suggested that the transaction was really a mortgage
132½ for investment of funds, and not a lease, but this is immaterial here. Whatever the relation, there is no adequate remedy at law. A suit for the rent not paid and the right to which is denied, if available at law by proof of the facts constituting the fraud, could leave the muniment of title still outstanding and always threatening and the process of collecting the rent by suit might be and would probably have to be repeated at every rent day, while witnesses might die and proof be destroyed. So of ejectment, if that be possible in the complications of the case. The muniments of title would still be outstanding and uncancelled. Moreover, the

purchasers being entitled to the interest of the original tenants for life of the *cestuis que vie*, it may be doubtful if ejectment would be as a trial of title. But if it did no such action would afford the adequate and plenary relief asked by this bill. It is not sufficient that there is a remedy at law; that remedy must be full, complete, and adequate, and under the peculiarities of this case it clearly is not.

It is not necessary to consider whether on the allegation of the bill it appears that the defendants are innocent purchasers or have any other defence which *which* may be available, such, for example, as that the action of Kepbler was binding on the plaintiffs and that their remedy is against him. If the defendants had such knowledge, actual or constructive, of this fraud as would protect the plaintiffs from their title, they might recover on this bill, possibly, notwithstanding Kepbler's authority to bind them. All these matters are more properly cognizable on the issues made by answer or plea.

133 The bill is good on its face substantially.
Demurrer overruled.

Harmon, Colston, Goldsmith and Hoadley, for plaintiffs; A. B. Huston and Wilby and Wald, for defendants.

134 And afterwards, to wit, on the 28th day of August, A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal Y, p. 35.

This cause came on to be heard upon the demurrer to the bill of complaint and was argued by counsel, and, the court being fully advised in the premises, it is ordered, adjudged, and decreed that said demurrer be, and the same hereby is, overruled, and the defendant August Vos is allowed until the first Monday of October, 1888, to plead or answer to the bill.

And afterwards, to wit, on the 30th day of August, A. D. 1888, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Replication to Answer of Wm Stix.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS *et al.*

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatso-

ever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or de-
135 nied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

HARMON, COLSTON, GOLDSMITH AND HOADLY, *Solicitors for Complainants.*

And afterwards, to wit, on the 14th day of September, A. D. 1888, the following plea was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Plea of August Vos.

U. S. Circuit Court of the Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS *et al.*

The plea of August Vos, one of the above-named defendants, to the bill of complaint of the above-named complainants.

The defendant August Vos, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of said bill saith that on the 16th day of April, 1887, he did bid off and purchase the fee-simple title of the premises first described in said bill at public sale had under the proceedings and decree of the court of common pleas of Hamilton county, Ohio, in the cause of Meyer Gugenheim *vs.* Moritz Loth *et al.*, No. 74375, set
136 forth in said bill, in which cause the above-named complainants were parties defendant; and this defendant doth aver that by the terms of said decree, which was entered February 15th, 1887, the said court ordered, with the consent of said James Hampden Robb and Charles E. Strong, trustees, that the fee-simple title of said premises be sold freed from the claims of said James Hampden Robb and Charles E. Strong, trustees, and all other parties to said suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of sale, and said court directed the special master commissioner appointed to make said sale, George Sidney Tylor, to sell said premises, freed from the claims of all parties to said case, as upon execution of law; and this defendant doth also aver that on the 25th day of February, 1887, the clerk of said court duly issued an order of sale in pursuance of said decree to said George Sidney Tylor, special master commissioner, who thereupon, proceeding to execute the same, did, on the 8th day of March, 1887, summon and swear H. Hemmelgarn, John E. Bell, and J. Burgoyne, Jr., three disinterested freeholders and residents of said

Hamilton county, as an inquest to appraise said premises, and they thereafter, on the same day, returned their apprais-ment of the same at the sum of $12,000.00, and a copy of said inquisition was filed in said cause March 9th, 1887, according to law, as by said copy, reference being had thereto, will more fully appear; and this defendant doth also aver that the said special master commissioner then caused the time and place of the sale of said premises, fixed at 2 o'clock p. m. of April 16, 1887, on the premises, to be advertised in the Cincinnati Commercial Gazette and the Cincinnati Daily Volksblatt, newspapers printed and of general circulation in said county, the latter being printed in German, for the period of
137 more than 30 days prior to the day of sale, and otherwise complied with the said order and the provisions of the statute in such cases; and this defendant doth also aver that on the 16th day of April, 1887, at 2 o'clock p. m., on said premises, the said special master commissioner exposed said premises to sale at public auction, and thereupon this defendant, August Vos, did bid for the same the sum of $9,100.00, and, his being the highest and best bid offered therefore and more than two-thirds of the appraised value thereof, the said premises were then and there struck off and sold to this defendant by said special master commissioner, who, on the 25th day of April, 1887, filed said order of sale, with the return of his proceedings thereon and of said sale thereto attached, in said cause, as by said order of sale and return, reference being had thereto, will more fully appear; and this defendant doth also aver that on the 19th day of May, 1887, the said court of common pleas entered a decree in said cause finding said proceedings and sale of said special master commissioner in all respects in accordance with law and confirming said sale and ordering said special master commissioner to convey to said purchaser, August Vos, by deed in fee simple the premises so sold to him; that copies of said decrees are filed with and made part of said bill, as by said decrees, reference being had thereto, will more fully appear; and this defendant doth also aver that on the 24th day of May, 1887, the said George Sidney Tylor, special master commissioner aforesaid, by deed of that date executed and delivered in consideration of said decrees and proceeding and of said sum of $9,100.00 in cash paid to him by said purchaser, August Vos, did sell and convey unto said August Vos, his heirs and assigns forever, the said premises, together with all the privileges and appurtenances thereto belonging, and all the estate, title, and interest of all the parties to said suit, including the
138 above-named complainants; which deed was recorded in Deed Book No. 635, page 45, of the records of said Hamilton county, and a copy of which is filed with said bill as Exhibit "D" and made part thereof, as by said deed, reference being had thereto, will more fully appear.

And this defendant doth also aver that the said sum of $9,100.00, the consideration money in said deed mentioned, was actually paid by him to the said George Sidney Tylor, special master commissioner, before the delivery of said deed to him on the date thereof, and this defendant doth also aver that at or before the respective

times of the entering of said decrees of the said proceedings and sale and of the execution and delivery of said deed and of the payment of said purchase-money he, this defendant, had no notice or knowledge whatsoever either that the said Charles A. Kebler or the said Frederick Roelker or the said firm of Kebler and Roelker had no authority to accept service of summons in said cause for the said complainants or either of them, or that such acceptance of service of said summons was without any authority in fact or validity in law, or that the said Kebler and Roelker, or either, were not authorized to file the said answer and answer and cross-petition for said complainants or either of them, or that said complainants or either of them did not consent that said premises should be sold free from their claim and title thereto, and that their said claim and title should be transferred to and reserved in the proceeds of sale to be made under said decree of sale, or that either said Kebler or said firm of Kebler and Roelker had no authority to make or give such consent for said complainants or either of them, or that every step, proceeding, or act
139 taken and done in said cause purporting to be on behalf of said complainants, or that the same were taken solely by fraud and mischief of the said Charles A. Kebler, with intent at the time to thereby secure the property and the money of said complainants, to appropriate the same to his own use, or that said complainants remained in ignorance of the said suit in said court of common pleas and of all that was done therein and of the receipt and said embezzlement of the money aforesaid by said Charles A. Kebler until after the death of said Kebler; and this defendant doth also aver that at or before the respective times aforesaid of said decree, proceedings, sale, deed, and payment he, this defendant, had no notice or knowledge whatsoever of any facts or matters alleged in said bill upon which said complainants pray for relief that in anywise affected the said premises as purchased by this defendant as aforesaid or any part thereof, or this title in fee simple acquired by such purchase, and this defendant doth therefore aver and insist that he is a *bona fide* purchaser of the said premises for a good and valuable consideration and without notice or knowledge that the acts and proceedings of said Charles A. Kebler and of the firm of Kebler & Roelker on behalf of said complainants alleged in said bill were unauthorized by said complainants and without their knowledge or that said complainants did not consent to said sale or of the alleged fraud on the part of said Kebler; and this defendant doth aver that he made said purchase fully believing that the said acts and proceedings of said Kebler and Kebler and Roelker were with authority and knowledge of said complainants and were
140 without fraud, and that said decree of sale was consented to by said complainants.

All which matters and things this defendant doth aver to be true and doth plead the same in bar to said bill and prays the judgment of this honorable court whether he should make any further answer to said bill; and this defendant, not waiving his said plea, but relying thereon and for better supporting the same, for answer saith that he had not at any time before or at the time of

purchasing the said premises or since, until after May 12th, 1888, when said complainants filed their petition in the superior court of Cincinnati against this defendant and William Stix, No. 43368, any notice whatsoever, either express or implied, actual or constructive, that the said acts and proceedings of Charles A. Kebler and Kebler and Roelker were without the authority or knowledge of said complainants, or that said sale — without the consent of said complainants, or of any fraud and mischief on the part of said Kebler in said acts and proceedings or of any matters alleged in said bill affecting the said premises or any part thereof or the title in fee simple thereto purchased by this defendant as aforesaid.

This defendant doth therefore pray to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

A. B. HUSTON AND
W. AUSTIN GOODMAN,
Solicitors for Def't August Vos.

A. B. HUSTON, *Of Counsel.*

I hereby certify that the foregoing plea of August Vos is, in my opinion, well founded in point of law.

A. B. HUSTON,
Of Counsel for August Vos.

111 UNITED STATES OF AMERICA,
Southern District of Ohio, State of Ohio, Hamilton County, } ss:

I, August Vos, the above-named defendant, being duly sworn, depose and say that my foregoing plea is not interposed vexatiously or for delay and is true in point of fact.

AUGUST VOS.

Sworn to before me and subscribed in my presence this 13th day of September, 1888.

[SEAL.] FRANK C. WALTZ,
Notary Public, Hamilton County, Ohio.

And afterwards, to wit, on the 27th day of September, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 93.

This day this cause came on to be heard upon the plea of August Vos to the bill of complaint and was argued by counsel, and the court, being fully advised in the premises, doth find said plea not sufficient to bar the complainants' right to the relief prayed for in the said bill of complaint. It is therefore ordered, adjudged, and decreed that said plea be, and the same hereby is, overruled; to which said August Vos excepts, and thirty days is allowed the said Vos in which to prepare his answer to said bill of complaint and present the same to the court for leave to file the same.

And afterwards, to wit, on the 26th day of Nov., A. D. 1888, an entry was made upon the journal of said court, clothed in the words & figures following, to wit:

Journal Y, p. 125.

Upon application of def't August Vos and for good cause shown further time is granted him to present his answer and X bill for filing in this cause until Dec. 10, 1888.

142 And afterwards, to wit, on the 8th day of December, A. D. 1888, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of August Vos.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

JAMES HAMPDEN ROBB *et al.*, Complainants,
vs.
AUGUST VOS, WILLIAM STIX, & MORITZ LOTH, Defendants. } No. 4184.

No. 4148. Answer of August Vos.

The defendant August Vos, now and at all times hereafter saving to himself all manner of benefit or advantage of exceptions or otherwise that can or may be taken to the many errors, uncertainties, and imperfections in the bill of complaint herein contained, for answer thereto or to so much thereof as he is advised it is material or necessary for him to make answer to, says:

He admits the allegations therein as to the residence and citizenship of complainants and defendants; he admits that on February 5th, 1885, complainants became seized in fee simple of all the lands described in said bill by a conveyance from said Moritz Loth for the consideration of $10,000, and that on the same day they executed and delivered to said Loth a lease of said premises containing the terms, covenants, and stipulations set forth in said bill; he admits that said Ellen W. Robb and Mary Robb are living.

143 Defendant further admits that on November 13, 1885, one Meyer Gugenheim brought an action, No. 74375, in the court of common pleas of Hamilton county, Ohio, against said Moritz Loth and others to subject said premises to sale to satisfy a judgment he had previously recovered against said Loth, as alleged in said bill; that these complainants were made parties defendant to said action and summons duly issued against them; that acceptance of service of said summons was entered thereon for these complainants by the firm of Kebler and Roelker, as their attorneys, the same being done by Chas. A. Kebler, of that firm, which was composed of himself and Frederick G. Roelker, then attorneys-at-law practicing in Hamilton county, Ohio; but this defendant denies that the said Kebler and Kebler & Roelker had no authority to

accept service of said summons for said complainants; on the contrary, defendant avers that said Kebler and Kebler & Roelker did have such authority, as he is informed and believes.

Defendants admits that on December 13th, 1885, said Kebler, for said Kebler and Roelker, filed in said cause an answer and cross-petition of said complainants setting up their interest in said premises, he, said Kebler, verifying the same. Defendant admits that on December 7, 1885, the said Kebler, for said Kebler & Roelker, and duly authorized, filed an answer in said cause for said William Stix, setting up a mortgage to him on said leasehold premises executed by said Loth and his wife March 30th, 1885, to secure the payment of $10,000 in six years and 25 interest notes for $175, each payable every three months, upon the conditions therein set forth,

as alleged in said bill, and praying for the payment thereof,
144 first, out of the proceeds of said sale of said premises, and thereafter on July 24, 1886, the same attorney filed an answer and supplemental answer and cross-petition of said Stix in said cause alleging as due certain of said interest notes and thereby the said principal note of $10,000, and that said mortgage had become absolute, and asking for the appointment of a receiver and for sale of said premises, and that these complainants be served with process upon the said cross-petition, as set forth in said bill.

He admits that these complainants were not served with such process, but denies that they had no notice or knowledge of said answer and X petition. He also admits that on said July 24, 1886, the said Kebler, for said Kebler and Roelker, filed in said cause an answer of these complainants to said cross-petition of William Stix, he verifying the same, reiterating the allegations in their former answer and cross-petition, therein admitting the allegations in said cross-petition of Stix and claiming their title to said premises prior to the mortgage claim of said Stix; also asking for appointment of a receiver and for sale of said leasehold premises to pay rent due February 1, 1886, and for sale of the fee simple of said premises to repay the $10,000 due them and interest as alleged in said bill.

Defendant denies that the said Kebler and Kebler & Roelker were not authorized to file said answer for these complainants or

that these complainants had no notice or knowledge of said
145 answer or the filing of same; on the contrary, he avers *he avers* that said Kebler and Kebler & Roelker had such authority and that said complainants had such notice or knowledge, as he is informed and believes.

Defendant also admits the entry of the decree Feb. 15, 1887, in said court of common pleas, on the said cross-petition of said Wm. Stix and the findings therein and the judgment of said Stix against said Loth for $10,905.56, with seven per cent. interest from January 3, 1887, and the right of said Stix to enforce the same against the said leasehold premises; also the order of said court, the same purporting to be with the consent of said Robb and Strong as trustees, directing the sale of the fee-simple title of said premises, free from the claims of said trustees & all other parties to said suit, their re-

spective rights in and to said premises being transferred to and reserved in the proceeds of such sale, and appointing George Sidney Tylor special master commissioner to make said sale, as alleged in said bill.

Defendant denies that said Robb and Strong, trustees, did not consent that said premises should be sold free from their claim and title thereto, or that their said claim and title should be transferred to or reserved in the proceeds of sale to be made under said decree, or that said Kebler and Kebler and Roelker had no authority to make or give such consent for them; on the contrary, he avers that they did so consent that said attorneys had such authority, as he is informed and believes.

Defendant also admits the proceedings taken under said decree as set forth in said bill and the sale, by said special master commissioner, at public auction, April 16, 1887, of said premises, part to this defendant and part to said William Stix, as described in said bill; also the report of said sale and the confirmation thereof by said court May 19, 1887, and that said special master was ordered to and thereafter, on May 24, 1887, did purport to convey
146 the said premises and all the right, title, and interest therein of all the parties to said suit to this defendant and said Stix respectively, as purchased by each and as fully described in said bill; that this defendant on said day last named entered into possession of the premises so purchased by him and into the receipts of the rents, issues, and profits therefrom, and claims to be the owner in fee simple, and denies any right, title, or interest of said complainants in or to the same.

Defendant also admits that he has failed and refused to perform any of the covenants and conditions of said lease as charged in said bill, and he avers that he was under no obligation to perform the same, but that by virtue of said sale and conveyance to him of the premises so purchased by him and the consideration of $9,100 which he paid therefor he acquired a perfect title to said premises in fee simple, including all the right, title, and interest of both said lessors of said lessee and free from the claims of all the parties to said suit.

Defendant also admits that by said decree of confirmation the proceeds of said sale, amounting to $31,038.32, were ordered to be and were distributed to the various parties to said suit, and therein said special master commissioner was directed to pay to these complainants, as trustees, or to Kebler, Roelker & Jelke, attorneys, the sum of $11,361.65, and that said special master, as this defendant is informed and believes, did pay said sum to said Chas. A. Kebler, one of said attorneys, for and in the name of said firm of Kebler, Roelker & Jelke.

Of the truth of the charge in said bill that the said Kebler embezzled and appropriated the said sum to his own use, and that said complainants have received no part of the same, this
147 defendant has no knowledge and does not admit the same.

Defendant denies that these complainants had no knowledge of said order of distribution or of the payment of said sum to

said Kebler, and he denies that neither said Kebler nor any other person was authorized to receive said sum of money or any part thereof, and he denies that the order of court directing such payment was null and void.

Defendant admits that said Kebler died November 23, 1887, but denies that he was wholly insolvent at all times mentioned in said bill; he also denies that prior or at the time of his purchase of said premises he knew complainants were absent from the State of Ohio or non-residents of said State during the time of said proceedings; he also denies that the proceedings and acts taken and done in said cause purporting to be on behalf of these complainants were without their authority, notice, or knowledge, or that they were done solely by fraud of said Kebler, or that they were ignorant of said suit and the proceedings therein and of the receipt of said money by said Kebler until after his death.

Defendant also denies that the said decree in the court of common pleas in said cause is null and void as to these complainants, or that the said court was without jurisdiction to order the said premises sold free from their claim and title, or that said sale and conveyance to this defendant by said Tylor are null and void.

Defendant also denies that no rent has been paid under said lease since February 5th, 1886, or that there is due and unpaid rents since that date at the rate of $600.00 per annum, or that these complainants have any lien on said premises therefor.

148 Of the truth of the charge in said bill that said Loth is insolvent, defendant has no knowledge and does not admit the same.

Further answering, defendant says that at the time the said deed was made by said Loth to said Robb and Strong, trustees, and said lease by them back to him, the transaction was understood and intended to be in fact a mortgage to secure an investment then made of $10,000 by said trustees for the purpose of furnishing an income to the said Ellen W. and Mary Robb; that at the same time it was understood and agreed, as this defendant is informed and believes, by and between the said trustees and the said Kebler and said Kebler & Roelker, that the said Kebler should have entire charge and control of said investment and the collection of said rent or interest and pay the same directly to the said Ellen W. and Mary Robb, the *cestuis que trust.* of said Robb and Strong, trustees, with full authority to protect said principal sum, as well as said interest, and collect the same when due and payable and pay the same as provided for by said trust and to represent and act for them in all matters required for the protection and collection of said interest and principal by suit or otherwise and in the payment of the same and in the carrying out of said trust as fully and completely as if said trustees were personally present and attached to the same, and in pursuance of such understanding and agreement and with the knowledge and consent of these complainants said Kebler collected the interest on said $10,000 paid as rent under said lease from said February 5-h, 1886, down to November 1st, 1887, and paid the same

over to said Ellen W. Robb and Mary Robb, and that he has
149 also paid over to the said Ellen W. Robb and Mary Robb a portion of said sum of $11,361.65 received by him from said special master, but how much thereof exactly this defendant is unable to state.

And, further answering, defendant says that any alleged want of authority on the part of said Chas. A. Kebler or said firm of Kebler & Roelker to do any and all of the acts by him or said firm done an- in said bill mentioned was supplied and all such acts purporting to be done on behalf of these complainants were ratified by them as follows: In that said complainants on March 2nd, 1888, in the court of common pleas of Hamilton county, Ohio, in the case of William J. Coppock, administrator, against John Kebler *et al.*, No. 79812 on the docket of said court, voluntarily entered their appearance and filed their answer and cross-petition, and again on April 10, 1888, in the same court, in the case of Wm. J. Coppock, adm'r, against John Kebler *et al.*, No. 79902 on the docket of said court, these complainants, having, on cross-petition of Frederick G. Roelker, been made parties defendant in said cases, voluntarily entered their appearance and filed their answer and cross-petition in each of said cases, being the same language and in each case averring that said Chas. A. Kebler, for his firm of Kebler & Roelker, had entered the appearance of said Robb and Strong, trustees, in said action in the bill herein mentioned brought by said Gugenheim, and had filed an answer therein on their behalf, and that on May 11, 1887, said firm of Kebler & Roelker had been dissolved and had been succeeded by the firm of Kebler, Roelker & Jelke, composed of said same Kebler and Roelker and of Ferdinand Jelke, Jr., and that thereafter all steps taken in said cause on behalf of said Robb and Strong, trustees, were taken by said new firm, and that in the case aforesaid, brought by said
150 Gugenheim, *in* the premises in the bill herein described had, pursuant to decree made therein, been sold by George Sydney Tylor, special master commissioner, free from the claims of said Robb and Strong, trustees, and all other persons whomsoever; averring further that the decree had been made in said cause on May 19, 1887, whereby it was ordered, adjudged, and decreed that said special mas- commissioner should pay to said Robb and Strong, trustees, or their counsel, Kebler, Roelker & Jelke, out of the proceeds of said sale, the sum of $11,361.65; and further averring that said sum had been by said special master commissioner, on June 16, 1887, duly paid to said firm, but that no portion thereof had by said firm been paid or accounted for to said Robb and Strong, trustees; and further averring that on November 2nd, 1887, said Chas. A. Kebler had deceased and that said Roelker & Jelke were the surviving partners of said firm of Kebler, Roelker & Jelke, and praying that said Jelke might be made party defendant to said causes, and that it might be adjudged that said Robb and Strong, trustees, were creditors of said firm of said Kebler, Roelker & Jelke, and that the property in the petition and cross-petition of said Roelker sought to be sold might be sold, and that out of the proceeds thereof said sum of $11,361.65, with interest from June 16, 1887, might be paid to said Robb and

Strong, trustees, and that said Robb and Strong, trustees, might recover judgment against said Roelker & Jelke, as surviving partners of Kebler, Roelker & Jelke, for said sum and interest. Said answer and cross-petitions were sworn to by the said James Hampden Robb and *was* signed and filed by the duly authorized attorneys of the said Robb and Strong, trustees. Said answers and cross-petition remained on file in said cases to May 16, '88, when, said cases having, in the meantime, been consolidated, said Robb & Strong, trustees, filed a demurrer to said X petition of Frederick G. Roelker on the ground that they had been improperly joined as defendants thereto; and thereafter, until May 26, 1888, when said demurrer was sus-
151 tained and said Robb and Strong, trustees, were dismissed from said cases. A copy of said answers and cross-petitions is filed with the answer of said defendant William Stix herein; to which copy reference is hereby made and this defendant incorporates said copy in this his answer as part thereof.

Defendant further says that at the time of swearing to said answers and cross-petitions and filing them said Robb and Strong, trustees, had full knowledge of all things and acts done on their behalf by said Kebler and Ke-ler & Roelker and Kebler, Roelker and Jelke, and that they deliberately adopted them as done on their behalf and ratified them and supplied all lack of previous authority upon the part of said Kebler and Kebler & Roelker and Kebler, Roelker & Jelke, if any such lack there previously had been, which this defendant denies; all of which matters and things this defendant is ready to prove as this court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

AUGUST VOS.

W. AUSTIN GOODMAN AND
A. B. HUSTON,
Solicitors for said August Vos.

STATE OF OHIO, }
County oh *Hamilton, City of Cincinnati,* } *ss:*

I, August Vos, being duly sworn, deposes and say that I have read the foregoing answer subscribed by me and know the contents thereof, and that all the several matters and things which are therein stated upon information and belief I believe to be true, and that all the several other matters and things therein stated are true in substance and in fact.

AUGUST VOS.

152 Sworn to and subscribed before me this 8th day of December, A. D. 1888.

ROBT C. GEORGI,
Deputy Clerk, U. S. Cir. Ct, S. D. O. [SEAL.]

And afterwards, to wit, on the 8th day of December, A. D. 1888, the following cross-bill was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cross-bill of August Vos.

Circuit Court of the United States, Southern District of Ohio, Western Division. In Chancery.

AUGUST VOS, Complainant,
vs.
JAMES HAMPDEN ROBB and CHAS. E. STRONG, Trustees of Wm. Stix and Moritz Loth, Defendants.

To the jusges of the circuit court of the United States for the southern district of Ohio, western division:

August Vos (who, together with Wm. Stix and Moritz Loth, are defendants in the suit pending in this court wherein James Hampden Robb and Chas. E. Strong, trustees, are complainants, No. 4148) now comes and brings this his cross-bill against the said James Hampden Robb and Chas. E. Strong, trustees — William Stix and Moritz Loth, and, humbly complaining, showeth unto your honors—

That your orator is a resident and citizen of the State of
153 Kentucky; that said James Hampden Robb and Chas. E. Strong are residents and citizens of the State of New York; that said William Stix is a resident and citizen of the State of Missouri, and that said Moritz Loth is a resident of the city of Cincinnati and a citizen of the State of Ohio.

That on or about the 5th day of February, 1885, the said Moritz Loth executed and delivered to the said James Hampden Robb and Chas. E. Strong, as trustees, a certain deed, which is recorded in Deed Book No. 577, page 569, of the records of Hamilton county, O., conveying to them in fee simple certain tracts or parcels of land situate in the city of Cincinnati, Hamilton county, Ohio, and described as follows, to wit:

154 Lying on the westerly side of Vine St. north of Mulberry St., to wit, lots No-. 3, 4, and 5, 20 feet front each, of the subdivision of a tract of land beginning on the west side of Vine St. at a line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine St. 100 feet and extending back westwardly of same width 132 feet, commencing for numbers from the south, making five lots of 20 feet front each, said lots 3, 4, and 5 then belonging to these plaintiffs, being 60 feet in front on the west side of Vine St., said lots being the same property heretofore conveyed by John Shelly to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilton county, Ohio, and also by E. B. Reeder to Moritz Loth by deed recorded in Book 401, page 387, records of deeds of Hamilton county, Ohio, and also all that other real estate situated in said city of Cincinnati, to wit, all th-t part of lot marked and numbered 2, block 12, in the plat of subdivision laid out by Gen. James Lindlay, J. C. and I. L. Ludlow, recorded in Book 49, page- 420 and 422, as now subdivided by the commissioners in the case
155 of partition of James and John Findlay, which fronts 50 feet on the west side of Vine street and extending westwardly of

the same width in the rear as in front to the depth of 100 feet *at* lot 2 in said block 12, Findlay and Ludlow subdivision, was set off by the Findlay commissioners to John Keen Findlay and was conveyed by said John Keene Findlay to said Moritz Loth by deed recorded in Book 358, page 571, of the records of deeds of Hamilton county, Ohio; also all that part of lot number 4 in the plat of the subdivision made by Findlay's commissioners of block 12 on the said plat of subdivision laid out by Findlay and Ludlow as fronts 50 feet on the west side of Vine street, extending back westwardly of even width in rear as in front to the depth of 100 feet, said 50 feet front on the west side Vine street by 100 feet deep being the same property set off with the rest of said lot 4 by Findlay's commissioners to James F. Irwin and conveyed by James F. Irwin to Moritz Loth by deed recorded in Book 389, page 320, of the records of — Hamilton county, Ohio; also that other certain lot in the city of Cincinnati aforesaid adjoining the westerly line of the lot last described fronting 17 feet on the west side of Vine St., running back westwardly of even width in the rear as in the front to the depth of 100 feet, said lot being 17 feet of the westerly part of lot 5 as marked by Findlay's commissioners on the plat of subdivision of block 12 of Findlay and Ludlow's subdivision aforesaid, the said lot being the property heretofore conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed recorded in Book 401, page 381, of the records of deeds of Hamilton county, Ohio.

156 The alleged consideration for said deed was the sum of $10,000 paid by said Robb and Strong to the said Loth, although the value of said land conveyed by said deed was very largely in excess of said sum.

On or about said February 5th, 1885, and contemporaneously with the delivery of said deed by said Loth to said Robb and Strong, and as part of the same transaction and pursuant to the previous agreement of the parties, said Robb and Strong, as trustees, executed and delivered to said Loth a certain lease, duly recorded in Lease Book 78, page 99, of the records of Hamilton county, Ohio, whereby they did lease and devise to the said Moritz Loth and assigns the premises aforesaid for and during the joint lives of one Ellen W. Robb and one Mary Robb and during the life of the survivor of them, said Loth and assigns yielding and paying therefor during the term aforesaid and for the further period of six months after the death of said Ellen W. Robb and Mary Robb and proportionately for the fraction of a year at the rate of $600.00 per annum, payable in half-yearly instalments of $300.00 each, the first instalment of $300 maturing August 5th, 1885. By said indenture of lease said Loth, for himself and assigns, covenanted and agreed with said Robb and Strong, trustees, that he would upon the death of said Ellen W. Robb pay to them within six months thereafter the sum of $5,000.00 in case the said Mary should then be living, but in case she should then be dead he covenanted for himself and assigns that he would pay said Robb and Strong the sum of $10,000.00 at the expiration of said period of six months in the place and stead of the sum of $5,000.00 as aforesaid.

But in case the said Mary should be living at the expira-
157 tion of said six months from the death of said Ellen it was in said lease covenanted and agreed by said Moritz Loth for himself and assigns that he would pay said Robb and Strong, trustees, six months after the death of said Mary the sum of $5,000, and would pay during the period of said Mary's survivorship of said Ellen rent at the rate of $300 per annum and proportionately for any fraction of a year, payable in half-yearly instalments of $150.00 each, until the death of said Mary. Said Loth, for himself and assigns, further covenanted in said lease that he would without demand pay during the term aforesaid the said sum as rent for said premises annually or proportionately for any fraction of a year in half-yearly instalments at the several periods hereinbefore mentioned, and also that he would pay all taxes and assessments, ordinary and extraordinary, that should at any time during the term of said lease be levied or charged upon said premises at the times when they should become payable, and also that he would keep the improvements on said lots and lands in as good order and repair as they were at the date of said lease or as they might thereafter be put into during the term of such lease, and that he would repair and rebuild said premises in case of loss or damage by fire or accident, ordinary wear and tear excepted, and that he would at his own expense keep said improvements on said premises insured in the sum of $5,000 in one or more insurance companies approved by said Robb and Strong, trustees, the proceeds of such insurance in case of loss by fire to be applied towards the repairing or rebuilding of the same; and further covenanted that for the said payments stipulated to be made by the said Loth as aforesaid and for the payments of taxes and assessments on said premises a lien was reserved in favor of said Robb and Strong, trustees, by said
158 indenture of lease upon the premises aforesaid and upon the interest of said Loth therein by virtue of said lease prior and preferable to all other liens thereon whatsoever. It was further covenanted and agreed in said lease by said Robb and Strong, trustees, for themselves, their heirs, successors, and assigns, that, all payments therein provided for being made and all the covenants therein to be observed by said lessee therein or his assigns being kept and performed, they would thereupon convey to said Moritz Loth, his heirs and assigns, by deed of special warranty, warranting only against incumbrances by them made, the lands, tenements, and hereditaments hereinbefore described.

Said Ellen W. Robb and Mary Robb are both still living.
159 Your orator further says that on the 30th day of November, 1885, one Meyer Gugenheim, having previously recovered a judgment against said Moritz Loth for the sum of $2,547.05 and having caused execution thereon to be issued and levied upon the premises herein described, brought a certain action, No. 74357, in the court of common pleas of Hamilton county, Ohio, against said Moritz Loth and said Robb and Strong, trustees, and divers other persons and corporations, the object of which suit was to obtain a sale of said premises and of sundry other tracts of land in said county

belonging to said Loth, and to subject the proceeds of sale of said lands, after the payment of prior liens and incumbrances thereon, to the satisfaction of his said judgment. Said Gugenheim in his petition in said suit alleged that said Robb and Strong, trustees, and that divers other persons therein named as defendants did have or claim to have some lien upon or interest in the premises hereinbefore described or some part thereof, and did pray that said Robb and Strong, trustees, and said others — required to answer said petition setting up any right, claim, lien, or interest they had in or to said premises or any part thereof. On said 13th day of November, 1885, a summons was duly issued in said case by the clerk of said court to the sheriff of said county of Hamilton, commanding him to notify the defendants in said case, including said Robb and Strong, trustees, that they had been sued by said Gugenheim in said court of common pleas, and that unless they answered by the 12th day of December, 1885, the petition of said Gugenheim against them said petition would be taken as true and judgment rendered accordingly.

Thereafter, to wit, on the 19th day of November, 1885, the firm of Kebler & Roelker and Frederick G. Roelker, attor-
160 neys-at-law and members of the bar of Hamilton county, Ohio, then engaged in the practice of the law at said bar (under said firm name), by said Chas. A. Kebler, acting for said firm, accepted service of summons on behalf of said Robb and Strong, trustees, by writing thereon as follows, to wit:

"We accept service of summons in the within cause for Chas. E. Strong and James Hampden Robb, trustees, and for William Stix, this November 19, 1885.

KEBLER & ROELKER,
Attorneys for Above-named Defendants,
Duly Authorized Thereto."

Thereafter on December 13th, 1885, said Kebler & Roelker, as att'ys for said Robb & Strong, trustees, filed an answer and cross-petition of said Robb and Strong, trustees in said cause, wherein was set forth the interest of said Robb and Strong, trustees, claimed by them in the premises hereinbefore described, and also attached, as part of the said answer, answers on behalf of said Robb and Strong, trustees, to interrogatories addressed to them and attached to the petition of said Gugenheim.

On the 7th day of December, 1885, said William Stix, by Kebler & Roelker aforesaid, his attorneys, filed in said suit in said court of common pleas his answer and cross-petition, alleging that the said Moritz Loth and Fredericka Loth, his wife, did, on the 30th day of March, 1885, duly execute and deliver to said Stix their deed
161 of mortgage, conveying unto him, his heirs and assigns, all the right, title, and interest of the said Moritz Loth in and to the premises hereinbefore described by virtue of the lease thereof aforesaid from said Robb and Strong, trustees, to said Loth, and also conveying other premises to secure payment by said Loth to said Stix of the sum of $10,000, payable six years after said March

30, 1885, with seven per cent. interest after maturity, payable quarterly, being a loan made by said Stix to said Loth, and further alleging that said mortgage contained a condition whereby said sum of $10,000 should immediately become due upon the non-payment of any one of 25 promissory notes, all dated March 30, 1885, made by said Loth to the order of said Stix, each for $175.00, and each maturing consecutively at intervals of three months from said date during said period of six years; and further alleging that said mortgage was valid and in full force and t-e *the* first and best lien on said leasehold premises and the real estate therein described, and praying that said interest of said Stix in said premises be protected, and that if said premises or any part thereof should be sold that the first proceeds thereof should be used in payment of the claim of said Stix aforesaid.

And further, on July 24, 1886, said Stix, by said Kebler & Roelker, his attorneys, filed in said cause in said court of common pleas his amended and supplemental answer and cross-petition, wherein it was alleged that certain of said promissory notes above mentioned for $175.00 each, to wit, those maturing nine, twelve, and fifteen months after said March 30th, 1885, respectively, had become due and payable, but had not been paid, and that thereby said note for $10,000 had become immediately due and payable and said mortgage consequently absolute, and praying for the appointment of a receiver to collect the rents payable by the occupants of said
162 leasehold and other premises and for the sale of all the same to satisfy said sums secured by said mortgage and said claim, the same to be a first and best lien upon said premises described in said mortgage; and said answer and cross-petition further alleged that said Robb and Strong, as trustees, did have or claimed to have some interest in the premises described in said mortgage, and did ask that they be served with process upon said cross-petition of said Stix, and thereupon, on said July 24th, 1886, said Kebler and Roelker, as attorne-s for said Robb and Strong, trustees, fi*p*ed in said cause an answer of said Robb and Strong, trustees, to said amended and supplemental answer and cross-petition of said Stix, wherein, after reiterating the allegations in the former answer and cross-petition filed by said Robb and Strong, trustees, were admitted all the allegations contained in said amended and supplemental answer and cross-petition of said Stix, but denying that the mortgage of said Stix was a lien on the leasehold property hereinbefore described prior in time to the title thereto of said Robb and Strong, trustees, but averring, on the contrary, that the title of said Robb and Strong, trustees, was prior to said mortgage and the claim of said Stix, and alleging said Ellen W. Robb and Mary Robb were still living, and that said Moritz Loth had failed to pay the rental due under the said lease from him to said Robb and Strong, trustees, falling due on February 1st, 1886; and further alleging that the same was then due and unpaid, and that said Robb and Strong, trustees, were entitled to have said leasehold premises sold in payment of said rental, and joining in the prayer of said Stix for the appointment of a receiver and for the sale of

said premises, and praying that the fee simple of said premises be sold and that they be repaid the $10,000 claimed to be due
163 them upon said sale, together with interest thereon from February 1, 1886, and $300 due Feb. 1, 1886, with interest thereon.

That thereafter, to wit, on February 15, 1887, such further proceedings were had in said sause in said court of common pleas that a decree was therein rendered on the said cross-petition and the amended and supplemental answer and cross-petition of said Stix aforesaid, and in said decree said court of common pleas found that on the 30th day of March, 1885, the said Moritz Loth, in consideration of $10,000, then loaned him by said Stix, executed and delivered to said Stix the notes hereinbefore mentioned, with the agreement that should any one of said 25 interest notes of $175.00 each not to be paid at maturity said $10,000 should then become due and payable and said mortgage securing the same enforceable by foreclosure, and did further find that three of said interest notes, to wit, those payable respectively at 9, 12, and 15 months after date, had not been paid and were due and unpaid, and that by reason thereof said $10,000 note had become due and payable and said decree gave judgment to said Stix that he recover from said Moritz Loth the sum of $10,905.56, with seven per cent. interest from the 3rd day of January, 1887, payable quarterly, and the said mortgage from the said Moritz Loth to said Stix was found by said decree to have been executed by said Loth and his wife upon the leasehold estate as well as upon the other property; and it was also found by said decree that the condition of said mortgage had become broken and that said Stix was entitled to enforce the same for the payment of said sum therein found due as aforesaid. Said decree, among other things, contained the following language: "It is further
164 ordered, and it is ordered with the consent of Henry W. Taylor and Chas. E. Strong and James Hampden Robb, trustees, that the fee-simple title of the premises described in said mortgage to William Stix be sold free from the claims of Henry W. Taylor and Chas. E. Strong and James Hampden Robb, trustees, and all other parties to this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale."

And one George Sydney Tylor was appointed by said decree special master commissioner to make said sale; such proceedings under said decree were thereafter had by said special master commissioner that the said premises hereinbefore described were by him exposed to sale at public auction, pursuant to the command of an order of sale issued by the said clerk of said court of common pleas under and by virtue of the decree aforesaid; that said premises were struck off and sold by him on the 16th day of April, 1887, part to this complainant and part to defendant William Stix. The part so struck off by said special master to this complainant was the following and for the price following by this complainant to said special master commissioner paid, being the same hereinbefore described as those certain tracts or parcels of land situate in the city of Cincinnati, Hamilton county, Ohio, and described as follows, to wit:

Lying on the westerly side of Vine street north of Mulnerry street, to wit, lots 3, 4, and 5, of 20 feet front each, of the subdivision of a tract of land beginning at the west side of Vine street at a line between land formerly owned by E. B. Reeder and the land of the heirs of Findlay, thence running south on Vine street 100 feet and extending back westwardly of the same width 132 feet, com-
165 mencing for numbers from the south, making five lot- *lots* of 20 feet front each, said lots 3, 4, and 5 being sixty feet in front on the west side of Vine street, said lots being the same property conveyed by John Shelley to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilton county, Ohio, and also by E. B. Reeder to Moritz Loth by deed recorded in Book 401, page 387, of the records of deeds of said county, at the price of $9,100.00, and the part of said premises so struck off and sold to said William Stix was all the remainder of the real estate hereinbefore described, and the price thereof was the sum of $3,131.32, which sum was paid by said Stix to said special master commissioner, and, said special master commissioner having duly reported said sale to said court of common pleas, the same was confirmed by said court by decree entered in said cause on the 19th day of May, 1887, and said special master commissioner was ordered to convey and thereafter, on the 24th day of May, 1887, did convey said premises in fee simple and all the right, title, and interest of all the parties to said suit to this complainant and the said William Stix as follows, namely: To this complainant, by deed recorded in Deed Book 635, page 45, Hamilton Co., Ohio, records, the lots and lands hereinabove described as purchased and paid for by him, and to the said William Stix, by deed recorded in Deed Book 630, page 556, the lots and lands hereinabove described as purchased and paid for by him.

And your orator says that on said 24th day of May, 1887, he entered into possession of the premises so purchased and conveyed to him, and has had possession thereof ever since, and has ex-ended a large amount of money thereon in repairs and permanent improvements, which he is ready to show to this court.

166 Your orator further says that by said decree of confirmation of said sale the proceeds thereof, amounting to $31,038.32, which included the sums paid by complainant and said Stix, were ordered to be and were distributed to various parties to said suit, and in order of distribution said decree directed there should be *be* paid to said Robb and Strong, trustees, or to Kebler, Roelker and Jelke, their attorneys, the sum of $11,361.65 by said special master commissioner, and he did pay said sum to said Kebler, Roelker & Jelke as attorneys for said Robb and Strong, trustees, on or about the 16th day of June, 1887. Subsequently, on the 2nd day of March, 1888, the court of common pleas of Hamilton county, Ohio, in the case of William J. Coppock, administrator, against John Kebler *et al.*, No. 79812 on the docket of said court, and again, on April 10, 1888, in said same court, in the case of Wm. J. Copock, administrator, against John Kebler *et al.*, numbered 79902 on the docket of said court, the said James Hampden Robb and Chas. E.

Strong, having been made parties defendant in said cases, voluntarily entered their appearance and filed their answers and cross-petition therein, the answer and cross-petition in each of said cases being in the same language and in each case averring that said Chas. A. Kebler, for his firm of Kebler and Roelker, had entered the appearance of said Robb and Strong, trustees, in the action, heretofore mentioned, brought by Meyer Gugenheim, and filed an answer therein on their behalf; that on May 11, 1887, said firm of Kebler & Roelker had been dissolved and had been succeeded by the firm of Kebler, Roelker and Jelke, composed of said same Kebler & Roelker and one Ferdinand Jelke, Jr.; that thereafter all steps taken in said cause on behalf of said Robb and Strong, trustees, were taken by said new firm; that in the said case brought by said Gugenheim the premises hereinbefore described had, pursuant to decree made therein, been sold by said George S. Tylor, special master commissioner,
167 free from the claims of said Robb and Strong, trustees, and all other persons whomsoever; averring further that a decree had been made in said cause on May 19, 1887, whereby it was ordered, adjudged, and decreed that said special master commissioner should pay to said Robb and Strong, trustees, or their counsel, Kebler, Roelker & Jelke, out of the proceeds of said sale, the sum of $11,361.65; and further averring that said sum had been by said special master commissioner on June 16, 1887, duly paid to said firm, but that no portion thereof had, by said firm, been paid or accounted for to said Robb and Strong, trustees; and further averring that on Nov. 23, 1887, said Chas. A. Kebler had deceased, and that said Roelker & Jelke were the surviving partners of said firm of Kebler, Roelker & Jelke; and praying that said Jelke might be made party defendant to said cases, and that it might be adjudged that said Robb and Strong, trustees, were creditors of said firm of Kebler, Roelker and Jelke, and that the property in the petition and in the cross-petition of Frederick G. Roelker sought to be sold might be sold, and that out of the proceeds thereof said sum of $11,361.65, with interest from June 16, 1887, might be paid to Robb and Strong, trustees, and that said Robb and Strong might recover judgment against said Roelker & Jelke, as surviving partners of Kebler, Roelker & Jelke, for said sum of $11,361.65, with interest from June 16, 1887.

And your orator says that said answers and cross-petitions of said Robb and Strong were sworn to by said James Hampden Robb and signed by Harmon, Coston, Goldsmith & Hoadly, and filed by them as attorneys for said Robb and Strong, trustees; said answers and cross-petitions remained on file until on May 16, 1888,
168 when, said *said* cases having in the meantime been consolidated, said Robb and Strong, trustees, filed a demurrer to the cross-petition of Roelker and Jelke on the grounds that they had been improperly joined as defendants thereto and thereafter until May 26, 1888, when said demurrer was sustained, and said Robb and Strong were dismissed from said cases. A copy of said answers and cross-petitions is filed with the answer of your orator to the

original bill brought by said Robb and Strong, trustees, in this honorable court, numbered on its docket No. 4148, to which copy reference is hereby made, and your orator incorporates in this cross-bill, as part thereof, said copy and also the Exhibits A, B, C, D, E, filed with said original bill, all of which he prays may be taken as a part of this cross-bill. Your orator further says that by reason of the premises he had hoped and believed that his title and right of possession to the real estate purchased by him as hereinbefore set forth migh- never be questtioned; but so it is that now the said Robb and Strong, trustees, have exhibited their bill of complaint against your orator and said Stix and Loth in this honorable court, claiming that all acts and things purporting in the proceedings aforesaid to have been done on their behalf by said Chas. A. Kebler, Kebler & Roelker, and Kebler, Roelker and Jelke were done without the knowledge, consent, or authority of said Robb and Strong, trustees; that all judgments, orders, and decrees made by said court of common pleas in the case brought by said Gugenheim were without jurisdiction and void as against them; that no title passed to your orator by the sale made to him by said Tylor, special master commissioner, and praying that this honorable court might so decree, and for further equitable relief, for details of which
169 reference is here *here* made to the prayer of said bill, which prayer is herein incorporated as though the same had herein been set forth in detail.

Your orator, while denying that any of the said acts of the said Kebler, or Kebler & Roelker or Kebler, Roelker and Jelke were done without the authority, knowledge, or consent of said Robb and Strong, trustees, but affirming the contrary, and not admitting but denying that the judgments, orders, and decrees aforesaid of the court of common pleas in the case brought by said Gugenheim were without jurisdiction and void, and affirming that the sale made to him as aforesaid conveyed to him a perfect title to the property purchased by him as against said Robb and Strong, trustees, and that he was an innocent purchaser of said property for a valuable consideration without notice of any want of authority, knowledge, or consent of said Robb and Strong, trustees, as alleged by them in their said *said* bill, and averring that if originally there was any want of authority on the part of said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke to do any of the acts done by them on behalf of said Robb and Strong, trustet*e*es, such authority was supplied, and that all acts so done by each of them were ratified by the said Robb and Strong, trustees, does charge as follows, to wit: That said Robb and Strong prior to the conveyance to them by Moritz Loth, hereinbefore mentioned, had in their hands as trustees the sum of $10,000.00 in trust to invest, to pay the interest thereon to said Ellen W. Robb and Mary Robb during their joint lives and the life of the survivor of them and thereafter to pay said principal sum to other beneficiaries of said trust; that to carry out the object of said trust they took from said Loth the conveyance and gave back to him the lease hereinbefore fully set forth; that said
170 transaction was intended to be a loan by said Robb &

Strong, trustees, of the sum of $10,000 to said Loth, & at the rate of 6 % per annum interest; that said deed & lease were understood & intended to be a mortgage—that is, for the purpose of security and nothing more—the rent reserved in said lease being exactly six per cent. per annum on said $10,000.00, and the value of said land conveyed being largely in excess of the consideration paid by said Robb and Strong, trustees, to wit, $10,000.

And your orator says that in a certain cause brought by said Robb and Strong, trustees, on May 12, 1888, against your orator and the said William Stix in the superior court of Cincinnati, No. 43368, removed to this court and now on the docket thereof, No. 4182, said Robb and Strong, trustees, filed their petition, averring that said transactions between them and said Loth were in truth and in fact a loan by them to said Loth of $10,000.00, in consideration whereof said Loth conveyed to them the premises hereinbefore described, and they executed to him the lease hereinbefore described, containing the privilege of purchase at $10,000.00, and that in consequence thereof they had a first and best lien upon said premises in the said sum of $10,000.00, with interest thereon.

Your orator refers to the certified copy of said petition contained in the transcript of the pleadings in said case No. 43368, superior court of Cincinnati, on file in this court in said case No. 4182, and incorporates the same herein.

And your orator avers and charges that at the time said money was invested and said deed and lease made it was understood and agreed by and between said Robb and Strong, trustees, and the said Kebler & Roelker or the said Kebler, on behalf of said firm of Kebler & Roelker, that said Kebler should have entire charge of
171 the collection of said rent or said interest when due and payable and pay the same directly to the said Ellen W. Robb and Mary Robb, and also to protect the said principal sum and collect the same when due and payable and pay the same as provided for by said trust, and to fully represent and act for said trustees in all matters required in the collection of said interest and principal and in the payment of the same and for the protection thereof, by suit or otherwise, so as to relieve said trustees of any and all charges as to same.

And your orator says that, in pursuance of said understanding and agreement, said Kebler did collect all interest paid as rent on said loan of $10,000.00 from the time of said investment down to the 1st day of November, 1887, and duly paid the same over to said Ellen W. Robb and Mary Robb, *cestuis que trust.* of said Robb and Strong, trustees.

And your orator charges that out of the said sum of $11,361.65 by said special master commissioner paid to Kebler, Roelker &
172 Jelke as aforesaid the latter paid a portion thereof, the exact amount being unknown to your orator, to said Ellen W. and Mary Robb, *cestuis que trust.* as aforesaid.

Wherefore your orator prays that in the event it be found, adjudged, and decreed by this honorable court that the acts and things done by said Kebler, or Kebler & Roelker, or Kebler, Roelker &

Jelke, were unauthorized by and not ratified by and not binding on said Robb and Strong, trustees, and the said judgments, orders, and decrees of said court of common pleas void against them; and that your orator acquired no title by his purchase and deed of the real estate aforesaid, as hereinbefore set forth, then it may be decreed by this court that the deed and lease aforesaid constituted only a mortgage to secure to said Robb and Strong, trustees, the payment of said $10,000.00 and interest, and that an account be taken to ascertain what proportion of said sum of $10,000.00 and interest ought justly to be borne by your orator as chargeable against the land covered by said mortgage purchased by him, taking into account the payments which it may be found said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke have made on account of said interest and principal or out of said sum of $11,361.65 to said Ellen W. Robb and Mary Robb, which proportionate sum that may be so found he hereby offers and agrees to pay as this honorable court shall direct; and he prays for all other relief to which he may in equity and good conscience be entitled in the premises.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, to be directed to said James Hampden Robb, Chas. E. Strong, William Stix, and Moritz Loth, commanding them and each of them, at a certain date and under a certain pain therein to be specified, personally to appear
173 before your honors and this honorable court, and then and there to answer all and singular the premises and stand to and perform and abide such order and decree therein as to your honors shall seem meet and agreeable to equity and good conscience.

W. AUSTIN GOODMAN AND A. B. HUSTON,
Solicitors for the said August Vos.

A. B. HUSTON, *Of Counsel.*

And afterwards, to wit, on the same day, there was issued out of the clerk's office of said court our certain subpœna, directed to the marshal of the district and against the defendants herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna in Chancery.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon James Hampden Robb and Chas. E. Strong, residents and citizens of the State of New York; William Stix, resident and citizen of the State of Missouri,
174 and Moritz Loth, citizen of and resident of the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in February next, to

answer a certain cross-bill in chancery filed and exhibited in said court against them by —— ——, citizen of and resident in the State of ——.

Hereof you are not to fail, under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this — day of December, A. D. 1888, and in the 113th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.* [SEAL.]

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of January, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

175 And afterwards, to wit, on the 10th day of December, A. D. 1888, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and CHAS. E. STRONG, Trustees, Complainants,
vs.
AUGUST VOS, WILLIAM STIX, & MORITZ LOTH, Defendants.

I hereby acknowledge myself security for costs in this case on cross-bill of Wm. Stix.

ERNST TROY. [SEAL.]

Taken and acknowledged before me this 10th day of Dec., 1888.

ROBERT C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

176 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Ernst Troy, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

ERNST TROY.

Sworn to and subscribed before me this 10th day of Dec., A. D. 188–.

ROBERT C. GEORGI,
[SEAL.] *Deputy Clerk U. S. — Court, S. D. O.*

And afterwards, to wit, on the 10th day of December, A. D. 1888, the following cross-bill of William Stix was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cross-bill of William Stix.

177 Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

JAMES HAMPDEN ROBB *et al.*, Complainants,
vs.
AUGUST VOS, WILLIAM STIX, & MORITZ LOTH, Defendants. } In Equity.

To the judges of the circuit court of the United States for the southern district of Ohio, western division:

Humbly complaining, showeth unto your honors the complainant William Stix that heretofore, to wit, on or about the 5th day of February, A. D. 1885, the defendant Morits Loth conveyed by deed in fee simple to defendants James Hampden Robb and Charles E. Strong, as trustees, the following parcels of land, in Cincinnati, Hamilton county, Ohio, and described as follows, to wit:

178 Lying on the westerly side of Vine St. north of Mulberry St., to wit, lots No. 3, 4, and 5, 20 feet front each, of the subdivision of a tract of land beginning on the west side of Vine St. at a line between land formerly owned by E B. Reeder and land of the heirs of Findlay, thence running south on Vine St. 100 feet and extending back westwardly of same width 132 feet, commencing for numbers from the south, making five lots of 20 feet front each, said lots 3, 4, and 5 then belonging to these plaintiffs, being 60 feet in front on the west side of Vine St., said lots being the same property heretofore conveyed by John Shelly to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilton county, Ohio, and also by E. B. Reeder to Moritz Loth by deed recorded in Book 401, page 387, records of deeds of Hamilton county, Ohio.

And also all that other real estate situated in said city of Cincinnati, to wit: All that part of lot marked and numbered 2, block 12, in the plat of subdivision laid out by Gen. James Findlay, J. C. and I. L. Ludlow, recorded in Book 49, page 420 and 422, as now

179 subdivided by the commissioners in the case of partition of James and John Findlay which fronts 50 feet on the west side of Vine street and extending westwardly of the same width in the rear as in front to the depth of 100 feet at lot 2, in said block 12, Findlay and Ludlow subdivision, was set off by the Findlay commissioners to John Keen Findlay and was conveyed by said John Keene Findlay to said Moritz Loth by deed recorded in Book 358, page 571, of the records of deeds of Hamilton county, Ohio; also all that part of lot number 4, in the plat of the subdivision made by Findlay's commissioners of block 12 on the said plat of subdivision laid out by Findlay and Ludlow, as fronts 50 feet on

the west side of Vine street, extending back westwardly of even width in rear as in front to the depth of 100 feet, said 50 feet front on the west side of Vine street by 100 feet deep being the same property set off with the rest of said lot 4 by Findlay's commissioners to James F. Irwin and conveyed by James F. Irwin to Moritz Loth by deed recorded in Book 389, page 320, of the records of Hamilton county, Ohio; also that other certain lot in the city of Cincinnati aforesaid, adjoining the westerly line of the lot last described, fronting 17 feet on the west side of Vine St., running back westwardly of even width in the rear as in the front to the depth of 100 feet, said lot being 17 feet of the westerly part of lot 5 as marked by Findlay's commissioners on the plat of subdivision of block 12 of Findlay and Ludlow's subdivision aforesaid, the said lot being the property hereinafter conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed recorded in Book 401, page 381, of the records of deeds of Hamilton county, Ohio.

180 Said deed from said Moritz Loth to said Robb and Strong, as trustees, was duly recorded in Book 577, page 569, of the records of deeds of Hamilton county, Ohio, and the alleged consideration for said deed was the sum of $10,000 paid by said Robb and Strong to said Loth, although the value of said land conveyed by said deed was very largely in excess of said sum.

On February 5th, 1885, contemporaneously with the delivery of said deed by said Loth to said Robb and Strong and as part of the same transaction and pursuant to the previous agreement of the parties, said Robb and Strong, as trustees, executed and delivered to said Loth a certain lease duly recorded on said day in Lease Book 78, page 99, of the records of Hamilton county, Ohio, whereby they did lease and devise to the said Moritz Loth and assigns the premises aforesaid for and during the joint lives of one Ellen W. Robb and one Mary Robb and during the life of the survivor of them, said Loth and assigns yielding and paying therefor to said Robb and Strong, trustees, during the time aforesaid and for the further period of six months after the death of said Ellen W. Robb annually and proportionately for the fraction of a year at the rate of $600 per annum, payable in half-yearly instalments of $300 each, the first instalment of $300 maturing August 5, 1885. By said indenture of lease said Loth for himself and assigns cove-anted and agreed with said Robb and Strong, trustees, that he would upon the death of said Ellen W. Robb pay to them within six months thereafter the sum of $5,000 in case the said Mary should then be living, but in case she should then be dead he covenanted for himself and assigns that he would pay said Robb and Strong,

181 trustees, the sum of $10,000 at the expiration of said period of six months in the place and stead of the sum of $5,000 aforesaid.

But in case the said Mary should be living at the expiration of the said six months from the death of said Ellen it was in said lease covenanted and agreed by said Moritz Loth, for himself and assigns, that he would pay said Robb and Strong, trustees, six months after the death of said Mary, the sum of $5,000, and would pay, during

the period of said Mary's survivorship of said Ellen, rent at the rate of $300 per annum and proportionately for any fraction*tion* of a year, payable in half-yearly installments of $150 each until the death of said Mary; said Loth for himself and assigns further covenanted in said lease that he would, without demand, pay during the term aforesaid the said sums as rent for said premises annually or -portionately for any fraction of a year in half-yearly instalments at the several periods hereinbefore mentioned, and also that he would pay all taxes and assessments, ordinary and extraordinary, that should at any time during the time of said lease be levied or charged upon said premises at the times when they should become payable, and also that he would keep the improvements on said lots and lands in as good order and repair as they were at the date of said lease or as they might thereafter be put into during the term of such lease, and that he would repair and rebuild said premises in case of loss or damage by fire or accident, ordinary wear and tear excepted, and that he would not do or suffer waste thereon, and that he would at his own expense keep said improvements on said premises insured in the sum of $5,000 in one or more insurance companies approved by said Robb and
182 Strong, trus*trus*tees, the proceeds of such insurance in case of loss by fire to be applied towards the repairing or rebuilding of the same, and further covenanted that for the said payments stipulated to be made by the said Loth as aforesaid and for the payment of taxes and assessments on said premises a lien was reserved in favor of said Robb and Strong, trustees, by said indenture of lease upon the premises aforesaid and upon the interest of said Loth therein by virtue of said lease prior and preferable to all other liens thereon whatsoever. It was further covenanted and agreed in said lease by said Robb and Strong, trustees, for themselves, their heirs, successors, and assigns, that all payments therein provided for being made, and all the covenants therein to be observed by said lessee therein or his assigns being kept and performed, they would thereupon convey to said Moritz Loth, his heirs and assigns, by deed of special warranty, warranting only against incumbrances by them made, the lands, tenements, and her-ditaments hereinbefore described.

Said Ellen W. Robb and Mary Robb are both still living.

183 That on the 13th day of November, 1885, one Meyer Gugenherm, having previously recovered a judgment against said Moritz Loth for the su- of $2,547.05, and having caused execution thereon to be issued and levied u-on the premises herein described, brought a certain action No. 74357 in the court of common pleas of Hamilton county, Ohio, against said Moritz Loth and said Robb and Strong, trustees, and divers other persons and corporations, the object of which suit was to obtain a sale of said premises and of sundry other tracts of land in said county belonging to said Loth, and to subject the proceeds of sale of said lands, after the payment of prior liens and incumbrances thereon, to the satisfaction of his said judgment. Said Gugenheim in his petition in said suit alleged that said Robb and Strong, trustees, and that divers other persons therein named

as defendants did have or claimed to have some lien upon or interest in the premises hereinbefore described or some part thereof, and did pray that said Robb and Strong, trustees, and said others — required to answer said petition setting up any right, claim, lien, or interest they had in or to said premises or any part thereof. On said 13th day of November, 1885, a summons was duly issued in said case by the clerk of said court to the sheriff of said county of Hamilton, commanding him to notify the defendants in said case, including said Robb and Strong, trustees, that they had been sued by said Gugenheim in said court of common pleas, and that unless they answered by the 12th day of December, 1885, the petition of said Gugenh*eim* against them said petition would be taken as true and judgment rendered accordingly.

184 Thereafter, to wit, on the 19th day of November, 1885, one Chas. A. Kebler, an attorney-at-law & member of the bar of Hamilton Co., O., and practitioner at said bar, did, in the name of Kebler & Roelker, said Roelker being one Fred'k G. Roelker, also an att'y-at-law & member of said bar & practitioner thereat, & a partner of said Kebler in the practice of law at said city of Cincinnati, O., under the firm name of Kebler & Roelker, accept service of summons on behalf of said Robb and Strong, trustees, by writing thereon as follows, to wit:

"We accept service of summons in the within cause for Chas. E. Strong and James Hampden Robb, trustees, and for William Stix, this November 19, 1885.

KEBLER & ROELKER,
Attorneys for Above-named Defendants,
Duly Authorized Thereto."

Thereafter, on December 13th, 1885, said Chas. A. Kebler, in the firm name of Kebler & Roelker, as att'ys for said Robb & Strong, trustees, filed an answer and cross-petition of said Robb and Strong, trustees, in said cause wherein was set forth the interest of said Robb and Strong, trustees, claimed by them in the premises hereinbefore described, and also attached, as part of the said answer, answers on behalf of said Robb and Strong, trustees, to interrogatories addressed to them and attached to the petition of said Gugenheim.

On the — day of December, 1885, said William Stix, by Kebler & Roelker aforesaid, his attorneys, filed in said suit in said court of common pleas his answer and cross-petition alleging that the said Moritz Loth and Fredericka Loth, his wife, did, on the 30th day of March, 1885, duly execute and deliver to this *this* complainant their deed of mortgage conveying unto him, his heirs

185 and assigns, all the right, title, and interest of the said Moritz Loth in and to the premises hereinbefore described, by virtue of the lease thereof aforesaid from said Robb and Strong, trustees, to said Loth, and also conveying other premises to secure payment by said Loth to said Stix of the sum of $10,000, payable six years after said March 30, 1885, with seven per cent. interest after maturity, payable quarterly, being a loan made by said Stix to said Loth; and further alleging that said mortgage contained a condition whereby said sum

of $10,000 should immediately become due upon the non-payment of any one of 25 promissory notes, all dated March 30, 1885, made by said Loth to the order of this complainant, each for $175.00 and each maturing consecutively at intervals of three months from said date during said period of six years; and further alleging that said mortgage was valid and in full force and the first and best lien on said leasehold premises and the real estate therein described, and pray that said interest of this complainant in said premises be protected, and that if said premises or any part thereof should be sold that the first proceeds thereof should be used in payment of the claim of this complainant aforesaid.

And, further, on July 24, 1886, this complainant, by said Kebler & Roelker, his attorneys, filed in said cause, in said court of common pleas, his amended and supplemental answer and cross-petition, wherein it was alleged that certain of said promissory notes above mentioned for $175.00 each, to wit, those maturing nine, twelve, and fifteen months after said March 30th, 1885, respectively, had become due and payable, but had not been paid, and that thereby said note for $10,000 had become immediately due and payable and said mortgage consequently absolute, and praying for the appointment of a receiver to collect the rents payable by the occu-
186 pants of said leasehold and other premises and for the sale of all the same to satisfy said sums secured by said mortgage and said claim, the same to be a first and best lien upon said premises described in said mortgage; and said answer and cross-petition further alleged that said Robb and Strong, as trustees, did have or claimed to have some interest in the premises described in said mortgage, and did ask that they be served with process upon said cross-petition of this complainant; and thereupon, on said July 24th, 1886, said Kebler and Roelker, as attorne-s for said Robb and Strong, trustees, filed in said cause an answer of said Robb and Strong, trustees, to said amended and supplemental answer and cross-petition of *said* this complainant, wherein, after reiterating the allegations in the former answer and cross-petition filed by said Robb and Strong, trustees, were admitted all the allegations contained in said amended and supplemental answer and cross-petition of this complainant, but denying that the mortgage of said Stix was a lien on the leasehold property hereinbefore described prior in time to the title thereto of said Robb and Strong, trustees, but averring, on the contrary, that the title of said Robb and Strong, trustees, was prior to said mortgage and the claim of this complainant, and alleging said Ellen W. Robb and Mary Robb were still living, and that said Moritz Loth had failed to pay the rental due under the said lease from him to said Robb and Strong, trustees, falling due on February 1st, 1886, and further alleging that the same was then due and unpaid, and that said Robb and Strong, trustees, were entitled to have said leasehold premises sold in payment of said rental, and joining in the prayer of this complainant for the appointment of a receiver and for the sale of said premises, and praying that the fee simple of said premises be sold, and that they be repaid
187 the $10,000 claimed to be due them upon said sale, together

with interest thereon from February 1, 1886, and $300, due Feb. 1, 1886, with interest thereon.

That thereafter, to wit, on February 15, 1887, such further proceedings were had in said cause in said court of common pleas that a decree was therein rendered on the said cross-petition and the amended and supplemental answer and cross-petition of this complainant aforesaid, and in said decree said court of common pleas found that on the 30th day of March, 1885, the said Moritz Loth, in consideration of $10,000 then loaned him by this complainant, executed and delivered to this complainant the notes hereinbefore mentioned *and delivered to this complainant the notes hereinbefore mentioned* with the agreement that should any of said 35 interest notes of $175.00 each not *to* be paid at maturity said $10,000 should then become due and payable and said mortgage securing the same enforceable by foreclosure, and did further find that three of said interest notes, to wit, those payable respectively at 9, 12, and 15 months after date had not been paid and were due and unpaid, and that by reason thereof said $10,000 note had become due and payable and said decree gave judgment to this complainant that he recover from said Moritz Loth the sum of 10,905.56, with seven per cent. interest from the 3rd day of January, 1887, payable quarterly; and the said mortgage from the said Moritz Loth to said Stix was found by said decree to have been executed by said Loth and his wife upon the leasehold estate as well as upon the other property; and it was also found by said decree that the condition of said mortgage had become broken, and that this complainant was entitled to enforce the same for the payment of said sum therein found due as aforesaid.

Said decree, among other things, contained the following
188 language: "It is further ordered, and it is ordered with the consent of Henry W. Tay-or and Chas. E. Strong and James Hampden Robb, trustees, that the fee-simple title of the premises described in said mortgage to William Stix be sold free from the claims of Henry W. Taylor and Chas. E. Strong and James Hampden Robb, trustees, and all other parties to this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale."

And one George Sidney Tylor was appointed by said decree special master commissioner to make such sale, such proceedings under said decree were thereafter had by said special master commissioner that the said premises hereinbefore described were by him exposed to sale at public auction pursuant to the command of an order of sale issued by the said clerk of said court of common pleas under and by virtue of the decree aforesaid; that said premises was struck off and sold by him on the 16th day of April, 1887, part to this complainant and part to defendant William Stix; the part so struck off by said special master to this complainant was the following, and for the *proce* following by this complainant to said special master commissioner paid, being the same hereinbefore described as those certain tracts or parcels of land situate in the city of Cincinnati, Hamilton county, Ohio, and described as follows, to wit:

1. All that part of lot 2, block 12, on the plat of subdivision laid

LAW PHILADELPHIA.

out by Gen. James Findlay and J. C. and I. L. Ludlow hereinbefore described, which fronts 50 feet on the west side of Vine street and extending back westwardly of the same width in rear as in front 100 feet, at the price of $1,333.50.

2. All that part of lot 4 on the plat of subdivision made by
189 said Findlay's commissioners on block 12 on said subdivision made by Findlay and Ludlows hereinbefore described as fronts 50 feet on the west side of Vine street extending back westwardly of even width in rear as in front 100 feet, at the price of $1,333.50.

3. The premises adjoining the easterly line of the lot last described fronting $17\frac{41}{100}$ feet on the west side of Vine St. and running back of even width in rear as in front 100 feet, said $17\frac{41}{100}$ feet being off the west part of lot 5, as marked by Findlay's commissioners on a plat of subdivision of block 12 of Findlay and Ludlow's subdivision hereinbefore described, at the price of $464.32, and all the remainder of said real estate conveyed by said Moritz Loth to Robb and Strong, trustees, hereinbefore described, and by them leased to him, was by said special master commissioner struck off, sold, and conveyed to defendant Vos at the price of $9,100.00, which sum said Vos paid to said special master commissioner.

190 By said decree of confirmation of said sale the proceeds thereof amounting to $31,038.32, which included the sums paid by complainant and said Stix, were ordered to be and were distributed to various parties to said suit, and in order of distribution said decree directed there should be *be* paid to said Robb and Strong, trustees, or to Kebler, Roelker and Jelke, their attorneys, the sum of $11,361.65 by said special master commissioner, and he did pay said sum to said Kebler, Roelker & Jelke, as attorneys, for said Robb and Strong, trustees, on or about the 16th day of June, 1887. Subsequently, on the 2nd day of March, 1888, the court of common pleas of Hamilton county, Ohio, in the case of William J. Coppock, administrator, against John Kebler *et al.*, No. 79812, on the docket of said court, and again, on April 10, 1888, in said same court in the case of Wm. J. Copock, administrator, against John Kebler *et al.*, numbered 79902, on the docket of said court, the said James Hampden Robb and Chas. E. Strong, having been made parties defendant in said cases, voluntarily entered their appearance and filed their answers and cross-petition therein, the answer and cross-petition in each of said cases being in the same language and in each case averring that said Chas. A. Kebler, for his firm of Kebler and Roelker, had entered the appearance of said Robb and Strong, trustees, in the action heretofore mentioned, brought by Meyer Gugenheim, and filed an answer therein on their behalf; that on May 11, 1887, said firm of Kebler & Roelker had been dissolved and had been succeeded by the firm of Kebler, Roelker and Jelke, composed of said same Kebler & Roelker and one Ferdinand Jelke, Jr.; that thereafter all steps taken in said cause on behalf of said Robb and Strong, trustees, were taken by said new firm; that in the said case brought by said Gugenheim, the premises hereinbefore described had, pursuant to decree made therein, been sold

by said George S. Tylor, special master commissioner,
191 free from the claims of said Robb and Strong, trustees, and all other persons whomsoever; averring further that a decree had been made in said cause on May 19, 1887, whereby it was ordered, adjudged, and decreed that said special master commissioner should pay to said Robb and Strong, trustees, or their counsel, Kebler, Roelker & Jelke, out of the proceeds of said sale, the sum of $11,361.65; and further averring that said sum had been by said special master commissioner, on June 16, 1887, duly paid to said firm, but that no portion thereof had by said firm been paid or accounted for to said Robb and Strong, trustees; and further averring that on Nov. 23, 1887, said Chas. A. Kebler had deceased, and that said Roelker & Jelke were the surviving partners of said firm of Kebler, Roelker & Jelke, and praying that said Jelke, might be made party defendant to said cases and that it might be adjudged that said Robb and Strong, trustees, were creditors of said firm of Kebler, Roelker and Jelke, and that the property in the petition and in the cross-petition of Frederick G. Roelker, sought to be sold, might be sold, and that out of the proceeds thereof said sum of $11,361.65, with interest from June 16, 1887, might be paid to Robb and Strong, trustees, and that said Robb and Strong might recover judgment against said Roelker & Jelke, as surviving partners of Kebler, Roelker & Jelke, for said sum of $11,361.65, with interest from June 16, 1887.

And your orator says that said answers and cross-petitions of said Robb and Strong were sworn to by said James Hampden Robb and signed by Harmon, Coslton, Godlsmith & Hoadly, and filed by them as attorneys for said Robb and Strong, trustees; said answers and cross-petitions remained on file until on May 16, 1888, when
192 said *said* cases having in the meantime been consolidated, said Robb and Strong, trustees, filed a demurrer to the cross-petition of Roelker and Jelke on the grounds that they had been improperly joined as defendants thereto, and thereafter, until May 26, 1888, when said demurrer was sustained and said Robb and Strong were dismissed from said cases. A copy of said answers and cross-petitions is filed with the answer of your orator to the original bill brought by said Robb and Strong, trustees, in this honorable court, numbered on its docket No. 4148, to which copy reference is hereby made, and your orator incorporates in this cross-bill as -art thereof the said copy and also the Exhibits A, B, C, D, E, filed with said original bill, all of which he prays may be taken as a part of this cross-bill. Your orator further says that by reason of the premises he had hoped and believed that his title and right of possessi-n to the real estate purchased by him as hereinbefore set forth, migh-*might* never be questioned; but, so it is, that now the said Robb and Strong, trustees, have exhibited their bill of complaint against your orator and said Stix and Loth in this honorable court, claiming that all acts and things purporting in the proceedings aforesaid to have been done on their behalf by said Chas. A. Kebler, Kebler & Roelker, and Kebler, Roelker and Jelke, were done without the knowledge, consent, or authority of said Robb and Strong, trustees; that

all judgments, orders, and decrees made by said court of common pleas in the case brought by said Gugenheim were without jurisdiction and void as against them; that no title passed to your orator by the sale made to him by said Tylor, special master commissioner, and praying that this honorable court might so decree and for further equitable relief; for details of which reference is here
193 made to the prayer of said bill, which prayer is herein incorporated as though the same had herein been set forth in detail.

Your orator, while denying that any of the said acts of the said Kebler, or Kebler & Roelker, or Kebler, Roelker and Jelke, were done without the authority, knowledge, or consent of said Robb and Strong, trustees, but affirming the contrary and not admitting but denying that the judgments, orders, and decrees aforesaid of the court of common pleas in the case brought by said Gugenheim were without jurisdiction and void, and affirming that the sale made to him as aforesaid conveyed to him a perfect title to the property purchased by him as against said Robb and Strong, trustees, and that he was an innocent purchaser of said property for a valuable consideration without notice of any want of authority, knowledge, or consent of said Robb and Strong, trustees, as alleged by them in their said *said* bill; and averring that if originally there was any want of authority on the part of said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, to do any of the acgs done by them on behalf of said Robb and Strong, trustees, such authority was supplied, and that all acts so done by each of them were ratified by the said Robb and Strong, trustees, does charge as follows, to wit: That said Robb and Strong, prior to the conveyance to them by Moritz Loth, hereinbefore mentioned, had in their hands as trustees the sum of $10,000.00 in trust to invest, to pay the interest thereon to said Ellen W. Robb and Mary Robb, during their joint lives and the life of the survivor of them, and thereafter to pay said principal sum to other beneficiaries of said trust; that to carry out the object of said trust they took from said Loth the conveyance and gave back to him the lease hereinbefore fully set forth; that
194 said transaction was intended to be a loan by said Robb & Strong, trustees, of the sum of $10,000 to said Loth at the rate of 6% per annum interest; said deed & lease were understood & intended to be a mortgage—that is, for the purpose of security and nothing more. The rent reserved in said lease, being exactly six per cent. per annum on said $10,000 00 and the value of said land conveyed being largely in excess of the consideration paid by Robb and Strong, trustees, to wit, $10,000.

And your orator says that in a certain cause brought by said Robb and Strong, trustees, on May 12, 1888, against your orator and the said William Stix, in the superior court of Cincinnati, No. 43368, removed to this court, and now on the Docket thereof, No. 4182, said Robb and Strong, trustees, filed their petition averring that said transactions between them and said Loth were in truth and in fact a loan by them to said Loth of $10,000.00, in consideration whereof said Loth conveyed to them the premises hereinbefore

described, and they executed to him the lease hereinbefore described, containing the privilege of purchase at $10,000.00, and that in consequence thereof they had a first and best lien upon said premises in the said sum of $10,000.00, with interest thereon.

Your orator refers to the certified copy of said petition contained in the transcript of the pleadings in said case No. 43368, superior court of Cincinnati, on file in this court, in said case No. 4182, and incorporate the same herein.

And your orator charges that out of the said sum of $11,361.65, by said special master commissioner paid to Kebler, Roelker,
195 & Jelke, as aforesaid, the latter paid a portion thereof, the exact amount being unknown to your orator, to said Ellen W. and Mary Robb, *cestuis que trust*, as aforesaid.

Wherefore your orator prays that in the event it be found, adjudged, and decreed by this honorable court that the acts and things done by said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, were unauthorized by and not ratified by and not binding on said Robb and Strong, trustees, and the said judgments, orders, and decrees of said court of common pleas void against them, and that your orator acquired no title by his purchase and deed of the real estate aforesaid as hereinbefore set forth, then it may be decreed by this court that the deed and lease aforesaid constituted only a mortgage to secure to said Robb and Strong, trustees, the payment of said $10,000.00 and inter-st, and that an account be taken to ascertain what proportion of said sum of $10,000.00 and interest ought justly to be borne by your orator as chargeable against the land covered by said mortgage purchased by him, taking into account the payments which it may be found said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke have made on account of said interest and principal or out of said sum of $11,361.65 to said Ellen W. Robb and Mary Robb, which proportionate sum that may be so found he hereby offers and agrees to pay as this honorable court shall direct; and he prays for all other relief to which he may, in equity and good conscience, be entitled in the premises.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, to be directed to said James Hampden Robb, Chas. E. Strong, William Stix, and Moritz Loth, commanding them and each of them, at a certain date and under a certain pain therein to be specified, personally to ap-
196 pear before your honors and this honorable court and then and there to answer all and singular the premises and stand to and perform and abide such order and decree therein as to your honors shall seem meet and agreeable to equity and good conscience.

WILBY & WALD,
Solicitors for Wm. Stix.

And afterwards, to wit, on the same day, there was issued out of the clerk's office of said court our certain subpœna directed to the marshal of the district and against the defendants herein. Said subpœna is clothed in the words and figures following, to wit:

Subpœna in Chancery.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

197 You are hereby commanded to summon Moritz Loth and August Vos, impleaded with others, citizen- of and resident- in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in February next, to answer a certain cross-bill in chancery filed and exhibited in said court against them by William Stix, citizen of and resident in the State of Missouri.

Hereof you are not to fail, under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of December, A. D. 1888, and in the 113th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.* [SEAL.]

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of January, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

(Endorsed:) Ernst Troy acknowledges himself security for all costs for which the plaintiff may be liable in this suit.

198 And afterwards, to wit, on the 11th day of December, A. D. 1888, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and CHAS. E. STRONG, Trustees, Complainants,
vs.
AUGUST VOS, WILLIAM STIX, & MORITZ LOTH, Defendants.

I hereby acknowledge myself security for costs in this case for costs of A. Vos.

W. AUSTIN GOODMAN. [SEAL.]

Taken and acknowledged before me this 11th day of Dec., 1888.

B. E. DILLEY,
Deputy Clerk U. S. Cir't Court, S. D. O. [SEAL.]

199 SOUTHERN DISTRICT OF OHIO, *ss:*

I, W. Austin Goodman, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

W. AUSTIN GOODMAN.

Sworn to and subscribed before me this 11th day of December, A. D. 188–.

B. E. DILLY,
Dep. Clerk U. S. Cir. Court, S. D. O. [SEAL.]

And afterwards, to wit, on the 12 day of December, A. D. 1888, an order was made upon the order book of said court clothed in the words and figures following, to wit:

Order Book A, p. 21.

By consent of the parties leave is given William Stix to file an amended answer to the bill herein, which is accordingly done.

And afterwards, to wit, on the 12th day of December, A. D. 1888, the following amended answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amended Answer of William Stix.

200 Circuit Court of the United States for the Southern District of Ohio.

JAMES HAMPDEN ROBB and CHAS. E. STRONG, Complainants, *vs.* AUGUST VOS, WILLIAM STIX, and MORITZ LOTH, Defendants. } No. 4148.

Amended answer of William Stix.

William Stix, now and at all times hereafter reserving all manner of benefit and advantage to himself of exception to the many errors and insufficiencies in the bill herein contained, and not admitting, but denying, that the acts done by Chas. A. Kebler and the firm of Kebler and Roelker in said bill mentioned were done without the knowledge or consent of these complainants, and asserting that they were done with the knowledge and consent and at the request of complainants, for answer to said bill says that he purchased the property in the bill alleged to have been struck off to him at public judicial sale and paid therefor the following prices: for 50 feet of lot 2, $1,333.50; for 50 feet of lot 4, $1,333.50, and for

17.40 feet of lot 5, $464.32 in money, and all this without
201 any notice or reason to believe or suspect that said acts or any of them done by said Kebler and Kebler & Roelker in the bill mentioned without the consent, authority, and knowledge of complainants.

And, further answering, defendants says that any alleged want of authority on the part of said Chas. A. Kebler or said firm of Kebler & Roelker to do any and all of the acts by him or said firm done and in the bill mentioned was supplied and all acts by him or said firm done and in the bill mentioned purporting to be done on behalf of complainants were retified by complainants, in that complainants, on March 2nd, 1888, in the court of common pleas of Hamton county, in the case of Wm. J. Coppock, adm'r, against John Kebler *et al.*, which cause was numbered 79812 on the docket of said court, voluntarily entered their appearance and filed their answer and cross-petition, and again, on April 10, 1888, in said court, in the case of William J. Coppock, administrator, against John Kebler *et al.*, which case was numbered 79902 on the docket of said court, these complainants, having on the cross-petition of Frederick G. Roelker been made parties defendant in said cases, voluntarily entered their appearance and filed their answer and cross-petition in each of said cases, being in the same language, and in each case averring that said Chas. A. Kebler, for his firm of Kebler and Roelker, had entered the appearance of said Robb and Strong, trustees, in
202 said action in the bill herein mentioned brought by said Geggenheim, and had filed an answer therein on their behalf, and that on May 11, 1887, said firm of Kebler and Roelker had been dissolved and had been succeeded by the firm of Kebler, Roelker and Jelke, composed of said same Kebler and Roelker and Ferdinand Jelke, Jr., and that thereafter all steps taken in said cause on behalf of said Robb and Strong, trustees, were taken by said new firm, and that in the case aforesaid brought by said Guggenheim the premises in the bill herein described had, pursuant to decree made therein, been sold by George Sidney Tylor, special master commissioner, free from the claims of said Robb and Strong, trustees, and all other persons who-ever; averring, further, that a decree had been made in said cause on May 19, 1887, whereby it was ordered, adjudged, and decreed that said special master commissioner should pay to said Robb and Strong, trustees, or their counsel, Kebler, Roelker and Jelke, out of the proceeds of said sale the sum of $11,361.00, and further averring that said sum had been by said special master commissioner, on June 16, 1887, duly paid to said firm, but that no portion thereof had by said firm been paid or accounted for to said Robb and Strong, trustees, and further averring that on November 2, 1887, said Chas. A. Kebler had deceased, and that said Roelker and Jelke were the surviving partners of said firm of Kebler, Roelker and Jelke, and praying that
202½ said Jelke might be made party defendant to said causes, and that it might be adjudged that said Robb and Strong, trustees, were creditors of said firm of Kebler, Roelker and Jelke, and that the property in the petition and cross-petition of Frederick G.

Roelker sought to be sold might be sold, and that out of the proceeds thereof said sum of $11,361, with interest from June 16, 1887, might be paid to said Robb and Strong, trustees, and that said Robb and Strong, trustees, might recover judgment against said Roelker and Jelke, as surviving partners of Kebler, Roelker and Jelke, for said sum of $11,361, with interest from June 16, 1887.

Said answers and cross-petitions were sworn to by James Hampden Robb and were signed and filed by the duly authorized attorneys of said Robb and Strong, trustees.

Said answers and cross-petition remained on file in said cases until on May 16, 1888, when, said cases having meantime been consolidated, said Robb and Strong, trustees, filed a demurrer to the cross-petition of Frederick G. Roelker on the ground that they had been improperly joined as defendants thereto, and thereafter, until May 26, 1888, when said demurrer was sustained and said Robb and Strong were dismissed from said cases. A copy of said answers and cross-petitions is filed with the answer of this defendant herein, to which copy reference is hereby made, and defendant incorporates in this amended answer as part thereof said copy.

203 Defendant says that at the time of swearing to said answers and cross-petitions and filing them said Robb and Strong, trustees, had full knowledge of all things and acts previously done on their behalf by said Kebler and Kebler and Roelker and Kebler, Roelker and Jelke, and that they deliberat-ly adopted them as done on their behalf, and ratified them, supplied all lack of previous authority on the part of said Kebler and Kebler and Roelker and Kebler, Roelker and Jelke, if any such lack there previously had been, which this defendant denies; all which matters and things this defendant is ready to prove as this court shall direct, and prays to be hence dismissed with his reasonable costs and charges.

WILLIAM STIX.

WILBY & WALD,
Solicitors for William Stix.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

On this 4th day of December, 1888, before me personally appeared William Stix and made oath that he has read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge.

T. L. CRAWFORD,
Commissioner United States Circuit Court,
[SEAL.] *Eastern Division, Eastern Judicial District of Mo.*

204 And afterwards, to wit, on the 14th day of December, A. D. 1888, came the marshal to whom the aforesaid subpœna was in form directed and filed in the clerk's office of said court the same, with his proceedings had endorsed thereon in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, Ohio, on the 8th day of December, 1888, and on the 10th day of December, 1888, I served the within-named Moritz Loth with a true copy of this writ, having all the endorsements thereon, handed to him personally, and on the 13th day of December, 1888, I served the within-named James Hampden Robb, Char's E. Strong, and William Stix, with true copies of this writ, having all the endorsements thereon, handed to their attorneys respectively, who acknowledged such service by their endorsements hereon.

Fees: Total, $10.24.

H. C. URNER,
U. S. Marshal,
By J. KIERSTED, *Deputy.*

We accept service of this by copy for William Stix.
WILBY & WALD.

We accept service of this by copy for James Hampden Robb and Charles E. Strong.
HARMON, COLSTON, GOLDSMITH & HOADLY.

205 And afterwards, to wit, on the 14th day of December, A. D. 1888, came the marshal to whom the aforesaid subpœna was in form directed and filed in the clerk's office of said court the same, with his proceedings had endorsed thereon in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, Ohio, on the 10th day of December, 1888, and at said Cincinnati, Ohio, on the 12th day of December, 1888, I served the within-named Moritz Loth and August Vos each personally with true and correct copies of this writ, having all the endorsements thereon.

Fees: Total, $5.12.

H. C. URNER,
U. S. Marshal,
By J. KIERSTED, *Deputy.*

And afterwards, to wit, on the 21st day of December, A. D. 1888, the following replication was filed in the clerk's office of said court; clothed in the words and figures following, to wit:

Replication.

Circuit Court of the U. S., Southern District of Ohio.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS *et al.*
No. 4148. Replication.

These repliants, saving and reserving to themselves all manner of advantage of exception to the many insufficiencies of the said

answer of said August Vos, for replication thereto saith
206 they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Solicitors for Complainants.

And afterwards, to wit, on the 7th day of January, A. D. 1889, the following appearance was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance of J. Hempden Robb & Chas. E. Strong.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS *et al.*

Now comes J. Hempden Robb and Charles E. Strong, trustees, and enter their appearance, by Harmon, Colston, Goldsmith and Hoadly, their solicitors, to the cross-bill of August Vos and to the cross-bill of William Stix filed in this cause.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Solicitors for Complainants.

January 7, 1889.

207 And afterwards, to wit, on the 4th day of February, A. D. 1889, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal Y, p. 207.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

JAMES HAMPDEN ROBB *et al.*, Complainants,
vs.
AUGUST VOS, WILLIAM STIX, & MORITZ LOTH, Defendants.

And now, on motion of the complainants, James Hampden Robb and Charles E. Strong, they are granted 15 days from February 5th within which to file an answer to the cross-bill of August Vos, and also to the cross-bill of William Stix.

And afterwards, to wit, on the 16th day of February, A. D. 1889, the following answer to cross-bill of August Vos was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer to Cross-bill of August Vos.

208 Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB *et al.*, Plaintiffs,
vs.
AUGUST VOS, WILLIAM STIX, and MORITZ LOTH.

Answer to Cross-bill of August Vos.

James Hampden Robb and Charles E. Strong, saving to themselves all benefit of exception, for answer to the cross-bill of August Vos or so much thereof as they are advised it is material for them to make answer unto say—

They admit the citizenship of the person to be as averred by said Vos in his said cross-bill; they admit that at the time stated in said cross-bill said Vos executed and delivered to these plaintiffs, as trustees, the deed described in said cross-bill conveying the premises described in said cross-bill, and they admit that the consideration of said deed was $10,000 and that the same was paid by said Robb and Strong; they say they have no knowledge that the value of said land is largely in excess of said sum of $10,000 and do not admit the same to be true; they admit that on said 5th day of November, 1885, they, as trustees, executed and delivered to said Loth a certain lease, recorded in Book 78, page 99, of the records of Hamilton county, Ohio, described in said cross-bill; they do not admit that the same was a part of the same transaction by which they purchased the above-described real estate.

209 They admit all the terms of the lease described in said cross-bill. They admit that said Ellen W. Robb and Mary Robb are both living. They also admit that the said Meyer Gugenheim instituted on November 30, 1885, the suit described in the said cross-bill in the court of common pleas, Hamilton county, Ohio, case No. 74375.

They admit that said Charles A. Kebler on the 19th day of November, 1885, executed service of summons in their behalf in said case by writing on the said summons the acceptance, as set forth in said cross-bill. They further admit that on December 13, 1885, the said Kebler, in the name of Kebler & Roelker, filed an answer and cross-petition in their behalf in said case, and that said answer and cross-petition was to the tenor and effect as set forth in said cross-bill. They further admit that on the 7th day of December, 1885, said William Stix filed in said case his cross-petition to the tenor and effect as set forth in said cross-bill, an- that on said July 2nd, 1886, said Stix filed in said case his amended and supplemental answer and cross-petition to the tenor and effect set forth in said cross-bill, and they admit that all the other legal proceedings set forth in said cross-bill were taken and had, but they say that said C. A. Kebler nor said Kebler & Roelker nor said Kebler, Roelker & Jelke had any authority whatever to do any act or thing which he or

they or any of them did or purported to do on behalf of said Robb and Strong in or to said proceedings or any of them, and they say it is not true that the order of sale made in said case was made with the consent of either said Charles E. Strong or James Hampden Robb, trustees, and that they, said Strong and said
210 Robb, as trustees, did not consent that the fee-simple title of said premises should be sold free from their said claims, as set forth in the bill of complaint herein; and they say that said order of sale is null and void for the reasons set forth in said bill of complaint.

They say that said Vos has not entered into possession of the premises in question otherwise than by collecting the rents from persons in the occupation of said premises at the time of his alleged purchase thereof. They say they have no knowledge that he has expended any amount of money on said premises in the repairs and permanent improvements of the same, but, however that may be, they say that said Vos knew at the time of his alleged purchase of said premises at said sale that said sale was utterly null and void as to Charles E. Strong and James Hampden Robb, trustees, unless the said Charles A. Kebler had authority to enter their appearance, and he took the risk of said Kebler not having said authority.

They say that if said sum of $11,361.65 proceeds of said sale were paid to Kebler, Roelker and Jelke no part of the same has ever been paid to Robb and Strong, trustees.

As to the allegations in said cross-petition relative to the case of William J. Coppock, administrator, against John Kebler *et al.*, No. 79812 in the court of common pleas of Hamilton county, Ohio, they say it is true that they did file an answer and cross-petition as alleged in said cross-bill, but they say their voluntary appearance in said case has no significance because of having been made parties defendant in that case by the answer and cross-petition of one Roelker, also defendant in that case, and he could have been served by publication as a non-resident of the State of Ohio. They say they did not in said answer aver that said Kebler had any authority to enter their appearance in the Gugenheim case, and they
211 now say that the filing of said answer and cross-petition by them in said case of Coppock, administrator, is no bar to the prosecution of their bill of complaint herein. They say that when they discovered their true rights in the premises they withdrew their answer and cross-petition in said case and by demurring to the answer and cross-petition of said Roelker on the ground that they were improperly joined as defendants they were dismissed from said proceedings, all of which occurred prior to the filing of the bill of complaint in this case.

They say it is not true that by anything done by Robb and Strong as trustees in said case of Coppock, administrator, said Vos had the right either to hope or believe that his title or right to the possession of the real estate mentioned in the bill of complaint would not be questioned. They say that said Vos in said purchase was not an innocent purchaser for valuable consideration without

notice of the want of authority from the said Kebler or Kebler & Roelker, without notice of the want of consent of said Robb and Strong as trustees to the decree of sale entered in said Gugenheim case, and they say it is not true that any of the acts of said Kebler or Kebler & Roelker or Kebler, Roelker & Jelke have been ratified by any act of the said Robb and Strong as trustees. As to whether the transaction consisted of the conveying of the property mentioned in the bill of complaint and in the cross-bill of Moritz Loth to Robb and Strong, trustees, for the consideration of $10,000, and the making of a lease by Robb and Strong to Moritz Loth of the same property during the joint lives of Ellen W. Robb and Mary Robb was a loan, and whether said conveyance shall be regarded as a mortgage and to be foreclosed as such, said Robb and Strong say that they leave the same to the determination of the court upon the proof to be made by said *by said* August Vos of the allegations of his said cross-bill.

212 Said Robb and Strong say it is not true that it was ever understood or agreed by them or either of them that the said Kebler and Roelker or said Kebler, of the firm of Kebler & Roelker, should have charge of the collection of the rent when due and payable under said lease or should have authority to — the said principal sum or to collect the same when due and payable or should have any authority whatever in regard to the same or to represent or act for said trustees or either of them in any manner relating to the collection of said interest or principal, and they deny all the alleged authority of said Kebler or Kebler and Roelker as set forth in said cross-bill. They deny that said Kebler collected any of the interest on said $10,000 and paid the same to said Ellen W. Robb and Mary Robb, and they say that even if said Kebler did do so it does not follow that he was authorized to collect the said principal sum of $10,000. They say it is not true that any portion of the sum of $11,361.65 paid by said special master commissioner to Kebler, Roelker & Jelke as the proceeds of said sale of real estate was paid to Ellen W. Robb or Mary Robb, and they say that if the same was so paid to them or either of them they had no right to receive it and Kebler, Roelker & Jelk had no right to pay it.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Solicitors for ——.

We waive verification of the above answer of Robb & Strong.

A. B. HOUSTON,
Of Counsel for August Vos.

And afterwards, to wit, on the 16th day of Feb., A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer to X Bill of Wm. Stix.

213 Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB *et al.*, Plaintiffs,
vs.
AUGUST VOS, WILLIAM STIX, and MORITZ LOTH.

Answer to cross-bill of —— ——.

James Hampden Robb and Charles E. Strong, saving to themselves all benefit of exception, for answer to the cross-bill of William Stix or so much thereof as they are advised it is material for them to make answer unto, say:

They admit the citizenship of the person to be as averred by said Stix in his said cross-bill. They admit that at the time stated in said cross-bill said Stix executed and delivered to these plaintiffs as trustees the deed described in said cross-bill conveying the premises described in said cross-bill, and they admit that the consideration of said deed was $10,000, and that the same was paid by said Robb and Strong. They say they have no knowledge that the value of said land is largely in excess of said sum of $10,000 and do not admit the same to be true. They admit that on said 5th day of November, 1885, they as trustees executed and delivered to said Loth a certain lease recorded in Book 78, page 99, of the records of Hamilton county, Ohio, described in said cross-bill. They do not admit that the same was a part of the same transaction by which they purchased the above-described real estate.

214 They admit all the terms of the lease described in said cross-bill; they admit that said Ellen W. Robb and Mary Robb are both living; they also admit that the said Meyer Gugenheim instituted on November 30, 1885, the suit described in the said cross-bill in the court of common pleas, Hamilton county, Ohio, case No. 74375.

They admit that said Charles A. Kebler on the 19th day of November, 1885, executed service of summons in their behalf in said case by writing on the said summons the acceptance as set forth in said cross-bill; they further admit that on December 13, 1885, the said Kebler, in the name of Kebler & Roelker, filed an answer and cross-petition in their behalf in said case, and that said answer and cross-petition was to the tenor and effect as set forth in said cross-bill; they further admit that on the 7th day of December, 1885, said William Stix filed in said case his cross-petition to the tenor and effect as set forth in said cross-bill, and that on said July 2nd, 1886, said Stix filed in said case his amended and supplemental answer and cross-petition to the tenor and effect set forth in said cross-bill, and they admit that all the other legal proceedings set forth in said cross-bill were taken and had, but they say that said C. A. Kebler nor said Kebler & Roelker nor said Kebler, Roelker & Jolke had any authority whatever to do any act or thing which he or they

or any of them did or purported to do on behalf of said Robb and Strong in or to said proceedings or any of them; and they say it is not true that the order of sale made in said case was made with the consent of either said Charles E. Strong or James Hampden Robb, trustees, and that they, said Strong and said Robb, as trus-
215 tees, did not consent that the fee-simple title of said premises should be sold free from their said claims, as set forth in the bill of complaint herein, and they say that said order of sale is null and void for the reasons set forth in said bill of complaint.

They say that said Vos has not entered into possession of the premises in question otherwise than by collecting the rents from persons in the occupation of said premises at the time of his alleged purchase thereof; they say they have no knowledge that he has expended any amount of money on said premises in the repairs and permanent improvements of the same; but however that may be, they say that said Vos knew at the time of his alleged purchase of said premises at said sale that said sale was utterly null and void as to Charles E. Strong and James Hampden Robb, trustees, unless the said Charles A. Kebler had authority to enter their appearance, and he took the risk of the said Kebler not having said authority.

They say that if said sum of $11,361.65 proceeds of said sale were paid to Kebler, Roelker and Jelke no part of the same has ever been paid to Robb and Strong, trustees.

As to the allegations in said cross-petition relative to the case of William J. Coppock, administrator, against John Kebler *et al.*, No. 79812, in the court of common pleas of Hamilton county, Ohio, they say it is true that they did file an answer and cross-petition as alleged in said cross-bill, but they say their voluntary appearance in said case has no significance, because of having been made parties defendant in that case by the answer and cross-petition of one Roelker, also defendant in that case, and he could have been served by publication as a non-resident of the State of Ohio; they say they did not in said answer aver that said Kebler had any authority to enter their appearance in the Gugenheim case, and they now
216 say that the filing of said answer and cross-petition by them in said case of Coppock, administrator, is no bar to the prosecution of their bill of complaint herein; they say that when they discovered their true rights in the premises they withdrew their answer and cross-petition in said case, and by demurring to the answer and cross-petition of said Roelker, on the ground that they were improperly joined as defendants, they were dismissed from said proceedings, all of which occurred prior to the filing of the bill of complaint in this case.

They say it is not true that by anything done by Robb and Strong, as trustees in said case of Coppock, administrator, said Vos had the right either to hope or believe that his title or right to the possession of the real estate mentioned in the bill of complaint would not be questioned. They say that said Vos in said purchase was not an innocent purchaser for valuable consideration without

notice of the want of authority from the said Kebler or Kebler & Roelker, without notice of the want of consent of said Robb and Strong, as trustees, to the decree of sale entered in said Gugenheim case; and they say it is not true that any of the acts of said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, have been ratified by any act of the said Robb and Strong as trustees. As to whether the transaction consisted of the conveying of the property mentioned in the bill of complaint and in the cross-bill of Moritz Loth to Robb and Strong, trustees, for the consideration of $10,000, and the making of a lease by Robb and Strong to Moritz Loth of the same property during the joint lives of Ellen W. Robb and Mary Robb, was a loan, and whether said conveyance shall be regarded as a mortgage and to be foreclosed as such, said Robb and Strong say that they leave the same to the determination of the court upon the proof to be made by said *by said* August Vos of the allegations of his said cross-bill.

217 Said Robb and Strong say it is not true that it was ever understood or agreed by them, or either of them, that the said Kebler and Roelker, or said Kebler, of the firm of Kebler & Roelker, should have charge of the collection of the rent when due and payable under said lease, or should have authority to — the said principal sum, or to collect the same when due and payable, or should have any authority whatever in regard to the same, or to represent or act for said trustees or either of them in any manner relating to the collection of said interest or principal; and they deny all the alleged authority of said Kebler, or Kebler and Roelker, as set forth in said cross-bill. They deny that said Kebler collected any of the interest on said $10,000 and paid the same to said Ellen W. Robb or Mary Robb, and they say that even if said Kebler did do so it does not follow that he was authorized to collect the said principal sum of $10,000. They say it is not true that any portion of the sum of $11,361.65, paid by said special master commissioner to Kebler, Roelker & Jelke, as the proceeds of said sale of real estate, was paid to Ellen W. Robb or Mary Robb, and they say that if the same was paid to them, or either of them, they had no right to receive it, and Kebler, Roelker & Jelke had no right to pay it.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Solicitors for ——.

We waive verification of the above answer by oath of Robb & Strong.

WILBY & WALD,
Solicitors for Wm. Stix.
—— WILLIAMS,
Solicitor for Stix.

218 And afterwards, to wit, on the 20th day of Feb., A. D. 1889, the following replication was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Complainants,
vs.
AUGUST VOSS and WILLIAM STIX, Defendants.
4148. In Chancery.

Replication.

William Stix, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the answer of said Robb and Strong to the cross-bill of said William Stix, for replication thereunto saith that he will aver and prove his said cross-bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said Robb and Strong is uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denies, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said cross-bill he has already prayed.

WILBY AND WALD,
Solicitors for Wm. Stix.

219 And afterwards, to wit, on the 23rd day of February, A. D. 1889, the following replication was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Replication of August Vos.

Circuit Court of the United States, Southern District of Ohio, Western Division. In Chancery.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS, WILLIAM STIX, and MORITZ LOTH.
No. 4148.

The replication of August Vôs, complainant in cross-bill, to the answer of James Hampden Robb and Charles E. Strong to said cross-bill.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto,
220 confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to

aver and prove as this honorable court shall direct, and prays as in and by his said bill he hath already prayed.

W. AUSTIN GOODMAN AND
A. B. HUSTON,
Solicitors for August Vos.

And afterwards, to wit, on the 9th day of May, A. D. 1889, the following deposition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Depositions of James Hampden Robb and Charles E. Strong.

221 *Notice to Take Deposition.*

U. S. OF AMERICA,
Southern Dist. of Ohio, Western Division, — County, } ss:

JAMES HAMPDEN ROBB and CHAS. E. STRONG,
Trustees, Plaintiff-,
vs.
AUGUST VOS & WILLIAM STIX, Defendants.

Case No. 4148.
In Equity.

Pending in Circuit Court of the United States.

The above-named defendants will take notice that on Friday, the 26th day of April, A. D. 1889, the complainants above named will take the depositions of James Hampden Robb and Charles E. Strong, sundry witnesses, to be used as evidence in the trial of the above cause, at the office of Strong & Cadwallader, No. 36 Wall street, in the city and county of New York, in the State of New York, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

HARMON, COLSTON, GOLDSMITH &
HOADLY, *Solicitors for Complainants.*

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived.

Done this 13 day of April, 1889.

WILBY & WALD,
Attorney for Stix.
A. B. HUTTON,
Of Counsel for August Vos.

Instructions for Taking Depositions.

Depositions to be used in any Ohio court may be taken in Ohio before a judge or clerk of the supreme court, common pleas or probate court, before a notary public, justice of the peace, police judge, mayor, or chief magistrate of any city or town corporate, master commissioner, or person empowered by a special commission; out of Ohio, before a judge, justice, or chancellor of any court of record,

a justice of the peace, notary public, mayor, or chief magistrate of any city or town corporate, commissioner appointed by the governor of Ohio to take depositions, or any person authorized by a special commission. Depositions to be used in any district or circuit court of the United States may be taken before any judge of any United States court, any commissioner of any United States circuit court, any clerk of any United States district or circuit court, any chancellor, justice, or judge of a supreme or superior court, any mayor or chief magistrate of a city, any judge of a county court or court of common pleas of any of the United States, or any notary public, such officer not to be a relative nor of counsel or attorney to either party, nor otherwise interested in the event of the cause.

The depositions must be commenced on the day named, and some portion of a deposition taken on each successive day, Sundays and legal holidays excepted, adjournments being to the day next after the Sunday or holiday, unless otherwise agreed upon.

When depositions are taken under an agreement follow these instructions, except only where they are modified by the agreement.

Begin with the following caption: "Depositions of sundry witnesses taken before me (here name the officer and give his official character, as justice of the peace, notary public, etc.) within and for the county of ——, in the State of ——, pursuant to the annexed (notice or agreement, as the case may be), and at the time and place therein specified, to be read in evidence in behalf of the (pl'ff or def't, as may be), in which —— is plaintiff and —— is defendant, —— being present on behalf of plaintiff and —— on behalf of defendant.

A B, of lawful age, being by me first duly cautioned and solemnly sworn (or affirmed), deposes and says as follows: (Here write the deposition of A B). State, at the beginning of the deposition of each witness, that "(name the witness), of lawful age, being by me first duly cautioned and sworn, deposes and says as follows," as in the case of A B. The depositions may be taken by stating the facts in narrative form or in reply to questions first written down. Each witness must sign and may write his own deposition.

Objections to any question or answer or to any part of either or to any witness should be entered by the officer taking the deposition if either party demands it. This entry briefly states the objection and by whom it is made.

Letters, telegrams, etc., made part of the evidence, must be lettered or numbered consecutively, attached to the deposition, and referred to therein by the witness as "Exhibit A" or "Exhibit No. 1" (or 2, 3, etc.) or otherwise, according to the fact.

Adjournments, if there are any, and the beginning of the cross-examination and redirect examination should be noted by the officer at the time they occur; also any agreements concerning the depositions entered into by the parties to the suit or by their attorneys.

If taken by interrogatories and cross-interrogatories, under agreement or otherwise, these must each be put to the witness and an-

swered so far as he can answer it, and the answer be written down. The deposition must show that each interrogatory and cross-interrogatory was thus put and answered. Attach the interrogatories, etc., as received, to the depositions.

Close the depositions with a certificate in the form following, viz: "I, F G (stating official character, county, and State, as in caption above), do hereby certify that (naming all the witnesses who have testified) were by me first severally sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by myself (or by said witnesses respectively in my presence; or if by any other person name him and say by —— ——, who is not interested in this suit, in my presence and) in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice (or agreement) specified, and were continued from day to day, as above set forth; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit. In testimony whereof I have hereunto set my hand and official seal this — day of ——, A. D. 18—." (Signed) —— ——.

If the deposition is to be used in any United States district or circuit court the certificate must also state the reasons for taking the deposition, as that the witness lives more than a hundred miles from the place of trial; that he is bound on a voyage to sea; that he is ancient and infirm, etc. His testimony must be reduced to writing by the magistrate taking the deposition or by himself in the magistrate's presence, and by no other person, and the magistrate must certify accordingly. (U. S. Revised Statutes, sec. 363–'4–'5.)

If the depositions are to be read in an Ohio court and are taken before a mayor, notary public, or commissioner appointed as aforesaid, they must be certified under his official seal. If before any of the other officers above named (a special commission excepted), and out of Ohio, a certificate, under the seal of the court of the county or the great seal of the State in which the depositions are taken, must be annexed to the certificate of the officer taking the deposition that he was at the time of taking the same such officer as he represents himself to be in his certificate. This proof of official character is omitted when waived by agreement of the parties at the foot of the notice. This agreement does not waive the taking them at the time and place named in the notice.

The notice or agreement under which the depositions are taken must be attached to the depositions. In cases in U. S. courts the notice must name each witness. In Ohio courts the notice need not name the witness unless the deposition is to be used in his own behalf.

The fees for taking the depositions and postage should be taxed and a memorandum made by whom they were paid.

The whole should be sealed up and endorsed with the title (and number, if known) of the suit and name of officer taking the depo-

sitions and in whose behalf taken, and addressed and transmitted by said officer to the clerk of the court where the suit is pending; also indorse on the sealed side, "Sealed up, addressed, and transmitted by me," and sign this across the place sealed.

222 Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, Plaintiffs, *vs.* AUGUST VOS and WILLIAM STIX, Defendants. } Case No. 4148. In Equity.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

Depositions of sundry witnesses taken before me, Arthur W. Andrews, a notary public, duly commissioned and sworn and appointed for and residing in the city and county of New York, in the State of New York, in the district aforesaid, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the complainants in an action pending in the circuit court of the United States for the southern district of Ohio, western division, in which James Hampden Robb and Charles E. Strong, trustees, are plaintiffs and August Vos and William Stix defendants, George Hoadly, Jr., Esq., of counsel, being present on behalf of the plaintiffs, and W. A. Goodman, Esq., of counsel, on behalf of defendants.

223 And at such time and place the said counsel for the plaintiffs and defendants having stipulated that the examination of said witnesses be taken down by a stenographer and written out a-terwards and read over by the witnesses and subscribed and sworn to before me with the same effect as if the examination had been written out by me at the time of its taking, as required by statute, the examination of said witnesses was *produced* with, as appears in the following stenographer's minutes:

CHARLES E. STRONG, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by Mr. HOADLY, on behalf of plaintiffs.

By Mr. HOADLY:

Q. Mr. Strong, please state your name, residence, and occupation?

A. My name is Charles E. Strong; I reside in the city of New York, and my profession is that of a lawyer.

Q. Please state when you were last in the State of Ohio.

A. The last time I was in the State of Ohio to remain any time was at least twenty-five years ago.

Q. Please state whether or not you were acquainted with Charles A. Kebler.

A. I never knew him or saw him.

Q. Please state whether or not you were ever advised by the said Chas. A. Kebler of the bringing or pendency of a suit in the court of common pleas for the county of Hamilton, in the State of Ohio, in which Meyer Gugenheim was plaintiff and yourself together with Moritz Loth and others were defendants?

224 A. I never was advised by him of such a suit.

Q. I show you a summons in this case upon which appears a written acceptance of service on behalf of James Hampden Robb and Charles E. Strong, trustees, by Kebler & Roelker, att'ys. Please state what authority, if any, you gave for such acceptance.

A. I never gave any authority of any description.

Q. I now show you a summons issued on the cause of action of the First National Bank of Cincinnati, on which appears a like acceptance. Please state what authority, if any, you gave for such acceptance.

A. I never gave any authority for such acceptance of service.

Q. I now show you the answer and cross-petition of James Hampden Robb and Charles E. Strong, trustees, filed December 16, 1885, by Kebler and Roelker. Please state what authority, if any, you gave for the filing of such answer and X petition.

A. None whatever.

Q. I now show you a paper purporting to be the answer of Robb and Strong to the cross-petition of William Stix filed by Kebler & Roelker July 21, 1886. Please state what authority, if any, you gave for the filing of such paper.

A. None.

Q. I also show you a decree entered in said cause on the 15th day of Feb., 1887, upon page 260 of the minutes of said court, wherein it is recited that it is ordered, with the consent of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, that the fee simple of the title of said premises described in the mortgage to William Stix be sold, and said premises

225 sold free of the claims of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, and all other parties to this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale. Please state what authority, if any, you gave to Mr. Kebler or any other person to consent to such order.

A. None whatever.

Q. Please state when you first heard of the existence or pendency of this suit before referred to.

A. I first heard that there was such a suit shortly after the death of Mr. Kebler—that is, either in the latter part of 1887 or early part of 1888.

Q. Please state what, if any, connection you held personally with Mr. Charles A. Kebler with reference to this trust.

A. I never had any personal connection with him in regard to this trust or any other matter.

X examination by Mr. GOODMAN, on behalf of defendants.

By Mr. GOODMAN:

Q. Who is your cotrustee, Mr. Strong, in this trust?

A. Mr. James Hampden Robb.

Q. Who carried on the business of the trust, the correspondence in reference to it, with Charles A. Kebler?

A. I don't know.

Q. Please state whether or not you ever have had anything to do with this trust, except nominally, to be a trustee.

A. That is all I ever have had.

226 Q. Please state, Mr. Strong, whether in a suit pending in the Hamilton county common pleas, No. 79812, of Wm. J. Coppock, administrator, against John Kebler and others, filed April 10, 1888, you filed an answer and cross-petition, together with your cotrustee, Mr. James Hampden Robb.

A. I see that it is signed by Messrs. Harmon, Colston, Goldsmith, & Hoadly as attorneys for us, and I take it for granted that it was authorized by me.

Q. Can you state, then, whether you authorized George Hoadly, Jr., to make affidavit to the facts contained therein?

A. I suppose so; yes.

Q. And that you ratified any such affidavits?

A. Yes.

Q. Mr. Strong, in the case No. 79902, Ham. county common pleas, wherein Wm. J. Coppock was plaintiff and John Kebler and others, defendants, did you swear to an answer and cross-petition which was filed in said cause on May 2, 1888?

A. I did, sir.

Q. In case # 43368, of the superior court of Cincinnati, wherein James Hampden Robb and Charles E. Strong were plaintiffs and August Vos and William Stix were defendants, please state whether you authorized the bringing of said suit and knew of or ratified the statements contained therein and the affidavit.

A. I presume I did, as it is signed by the counsel we employed in the case.

Q. Please state whether in all of these cases, or if not, in whi-h one, you personally knew the statements that were made.

A. In none of them did I know anything about the facts
227 stated except through my counsel in Cincinnati.

Q. Not even the one that was signed by him and which you swore to?

A. No, sir. I had no knowledge except such as was derived from information.

Redirect examination by Mr. HOADLY.

By Mr. HOADLY:

Q. Do you know, Mr. Strong, where the deed to you and Mr. Robb for this property has been since its execution?

A. I do not. All I know in regard to it is when I was first in-

formed of this matter—Mr. Kebler's death and in the way in which he had attended to the affairs he was looking after—Mr. Robb stated to me that he was going to employ Mr. Olin to look after this matter in his behalf, and I then stated that I would be very glad indeed if Mr. Olin would do the same for me. Afterwards Mr. Robb seemed to prefer to dispense with the multiplicity of lawyers—that we should look after it in this office—and asked me if I would do so. I told him I would, and Mr. Olin sent me, among other papers, that deed, which is now in my possession. I don't know in whose possession it was before.

By Mr. GOODMAN:

Q. About what time did you get possession of that deed?
A. About the latter part of May, 1888.

CHARLES E. STRONG.

Sworn to before me this 26th day of April, 1889.
[SEAL.] A. W. ANDREWS,
Notary Public, N. Y. Ct. C.

228 JAMES HAMPDEN ROBB, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by Mr. HOADLEY on behalf of plaintiffs.

By Mr. HOADLEY:

Q. Mr. Robb, please state your name, residence, and occupation.
A. James Hampden Robb; No. 52 East 34th street; president of the department of public parks.
Q. Please state whether you were at any time between the 14th day of November, 1885, and the 15th day of February, 1887, present within the State of Ohio.
A. No.
Q. Please state whether you were acquainted with Charles A. Kebler, now deceased.
A. I was.
Q. Please state whether or not you were ever at any time informed by the said Kebler of the pendency of a certain suit in the court of common pleas of Hamilton Co., Ohio, No. 74375 on the docket of said court, and in which suit Meyer Gugenheim was plaintiff and Moritz Loth and others, together with yourself and Mr. Charles E. Strong, were named as defendants.
A. No; I have no recollection of ever having heard of such suit.
Q. Please state whether or not you are the same James Hampden Robb named as a grantee in this deed from Moritz Loth to James Hampden Robb and others.
A. I presume I am; certainly; Mr. Strong and myself.
Q. Please state whether or not that deed was executed to you and Mr. Strong as trustees in pursuance of a written agreement now shown you.

229 (Paper shown witness and maked Exhibit A.)

A. I have always supposed that it was.

Q. Please state what, if any, authority you gave to Charles A. Kebler or Kebler & Roelker for the execution of the acceptance of service of a summons in the action before referred to now shown you.

(Paper shown witness and marked Exhibit B.)

A. None whatever, that I am aware of.

Q. Please state what, if any, authority you gave for the execution of the acceptance of service of a certain summons in said action now shown you.

(Paper shown witness and marked Exhibit C.)

A. None whatever, that I am aware of. Never heard of it.

Q. I now show you a paper purporting to be the answer and crass-petition of James Hampden Robb and Charles E. Strong, trustees, filed by Kebler and Roelker and verified by Charles A. Kebler. Please state what, if any, authority you gave for the filing of and verification of such answer and cross-petition.

(Paper shown witness and marked Exhibit D.)

A. None whatever.

Q. I now show you a paper purporting to be the answer of James Hampden Robb and Charles E. Strong, trustees, to the cross-petition of William Stix, filed by Kebler & Roelker and verified by Charles A. Kebler. Please state what, if any, authority you gave for such filing and verification.

(Paper shown witness and marked Exhibit E.)

A. None whatever.

230 Q. I now show you an original decree in said suit entered on the 15th day of Feb, 1887, and reciting on the 7th page thereof that certain orders are made with the consent of Charles E. Strong and James Hampden Robb, trustees. Please state what, if any, authority you gave to any person to consent to such orders.

(Paper shown witness and marked Exhibit F.)

A. None whatever.

Q. Please state whether you ever consented to such orders.

A. I never did.

Q. Please state when you were first informed of the existence of such suit.

A. Well, I suppose that the information all came together at the time of Kebler's death, I being unaware that anything was wrong until his death took place.

Q. Please state from what source you first heard of the facts of the existence of this suit.

A. I think that Mr. Strong and myself, as trustees, got the information together through Messrs. Olin, Rives, & Montgomery, who were then acting for us. After Mr. Kebler's death they proceeded

to ascertain the facts; there being rumors that he had sold all the property that was in his hands, and I think they informed Mr. Strong and myself that there was such a suit or lien; it was the first time I ever heard of it.

Q. Please state where the deed heretofore shown you has been since its execution, if you know.

A. This deed was sent to me at the time of the settlement
231 of my father's affairs and was in my tin box until the matter was turned over tho Messrs. Olin, Rives, & Montgomery to act as counsel for Mr. Strong and myself and by them given to Mr. Strong when the firm here took charge.

Q. You were, Mr. Robb, I believe, a party to a suit in the court of common pleas of Hamilton county, in which Charles A. Kebler, as adm'r of the estate of James Robb, deceased, was plaintiff and Charlotta A. Pancoast and William A. Pancoast, her husband, and others were defendants, being a suit for the administration of your father's estate and the sale of lands to pay debts?

A. I believe so.

Q. Please state who represented you as attorney in that case.

A. Mr. King.

Q. Mr. Rufus King, of Cincinnati?

A. Yes; Mr. Rufus King.

Q. Please state whether Mr. Charles A. Kebler was your attorney in that case.

A. Not that I am aware of.

Q. Please state what authority, if any, you, as trustee, ever gave to Mr. Kebler to collect rent or otherwise deal with the property described in the deed before referred to.

A. I do not know or remember that there was ever any authority given to him to do anything, whether to collect rents or anything, unless there was kind of a tacit understanding that he should collect for my aunt, who was the beneficiary of this trust, and that he did collect rents and pay them over to her, I have no knowledge
232 of. I don't know whether he did or some one else did, but I have supposed that he did, as a convenience to her, though he never received any legal authority that I am aware of from either Mr. Strong or myself to act for us as trustees in any capacity whatsoever. He acted for my aunt, not for us.

Q. Please state who was the beneficiary of this trust.

A. Mrs. Eleanor Robb, my aunt, and at her death my cousin.

Q. Please state where such beneficiary resides.

A. At Cheviot, in Hamilton county, Ohio.

Cross-examination by Mr. GOODMAN on behalf of def'ts.

By Mr. GOODMAN:

Q. Mr. Robb, you state that this deed was sent to you at the settlement of your father's estate by Chas. Kebler. Can you fix about what time that was?

A. No; not exactly. The papers of the settlement would indicate that. It was some time before I went to Europe in 1885.

Q. Do you remember whether he sent the deed at the same time that he sent the lease to Loth that you and Mr. Strong executed?

A. I have not the least recollection.

Q. Do you recollect that he sent the deed and lease to you May 9, 1885, with the request that you will sign the lease and return them so that they can be put on record? Whether you did return them?

A. I think I did. The lease would show that, but I have no recollection of it; very possible I did.

Q. Is your recollection positive that after returning them to Kebler—that is, the lease and the deed to be recorded—that he sent them back to you or kept them in his possession?

A. Well, really, I could not tell. The only recollection I
233 have *I have* about the transaction at all is that the deed was in my possession; any further information could only be ascertained by reference to my letter book.

Q. Well, you found it in your possession after this agreement was made, but you cannot say how long?

A. No; but my recollection is that it was sent to me at the time of the settlement of my father's estate.

Q. Mr. Robb, I will ask you please to examine these Exhibits Nos. 1, 2, and 3 and state whether you authorized their filing and whether you swore to one of them and authorized the verification of the others?

(Exhibits shown to witness and markes as above Nos. 1, 2, 3.)

A. Yes; I presume those are all in order.

Q. You state, Mr. Robb, that the beneficiary of this trust is Mrs. Eleanor Robb?

A. Yes; my aunt, Mrs. Wm. Robb.

Q. You have a great deal of affection for your aunt, I believe?

A. I have a very great affection for her.

Q. And she is a person eminently worthy of belief?

A. Entirely so.

Q. Do you remember writing to Mrs. Robb, telling her that Charles A. Kebler had full charge of that trust and requesting her to apply to him for income and for any other information that she wanted in reference to it?

A. It is very likely that I did write to my aunt that Mr. Kebler would do all possible for her in facilitating the payment to her as beneficiary of the income of this trust, and also that she could go to him for anything; that he would act for her in any case, as, for instance, the payment of the taxes.

234 Q. Did you not write to her that you had made the arrangement with Kebler by which he was to turn over the annual interest on this fund to her and for her to apply to him for the interest?

A. Very possible that I did in the same way. That he was to pay her the interest, that was very possible, or, in other cases, that she would apply to him for the interest; but at no time did I ever empower him, directly or indirectly, to act in any way as represent-

ing Mr. Strong and myself as trustees or associating him with us in any way as a cotrustee.

Q. Mr. Robb, how long have you known Mr. Charles A. Kebler?

A. I have known Mr. Kebler since he was quite a young man; 20 y'rs, perhaps, or more.

Q. Please state what connection by marriage, if any, he is to you?

A. He was a cousin of my wife.

Q. Please state what your social and business relations were with him from about the year 1879 until his death.

A. Well, I always had pleasant relations with him—that goes without saying; and as he always stood at the top of the bar in Cincinnati, we had no reason to suspect that he was dishonest. Personally, I had no particular relation with him except in the way of my father's affairs. His father, Mr. John Kebler, was a friend of my father and had acted for him, and in that way it was very natural that Mr. Charles A. Kebler should become associated in this matter. For several years past I have not heard anything of him, and my suspicions were aroused that there was something wrong while I was in Europe, because he would not write. I could
235 not get any answer to my letters which I had written to him regarding the estate of my sister, Madam San-Roman, whose affairs were also in his hands. I confess that I did not suppose he had done anything wrong, but my receiving no answer to my letters made me suspect that something was wrong and which I found out at the time of his death.

Q. You state, Mr. Robb, that in the case where Charles A. Kebler was administrator against your sisters in affecting the settlement of your father's estate Mr. Rufus King represented you?

A. He was my counsel.

Q. Do you know whether or not he, together with Mr. Kebler, made investment of the trust money?

A. I really don't know.

Q. At the time, although nominally, Charles A. Kebler was plaintiff and you were defendants, is it not a fact that he was looking after your affairs?

A. Not that I am aware of.

Q. Did you not write to Mr. King that in all matters which came up to consult with Mr. Charles A. Kebler?

A. Possibly.

Q. At whose suggestion was Charles Kebler appointed administrator of your father?

A. At my suggestion.

236 Q. Did you also suggest that at the death of Mr. John Kebler he should take the position of trustee for your sister, Madame San-Roman?

A. I did.

Q. You carried on an extensive correspondence, did you not, with Mr. Charles Kebler during the years 1881 to 1885?

A. I communicated with him.

Q. Mr. John Kebler and John Kebler & Sons, did they not always represent your and your father's interests?

A. No, hardly; Mr. Robert Buchannan, Mr. Alexander Long, Mr. Kramer, and several others have had charge.

Q. Mr. Robb, be good enough to say if these are your letters. (Letters shown to witness and marked Exhibits Nos. 4 to 20, both inclusive.)

A. The letters offered, Nos. 4 to 20, were written by me.

J. HAMPDEN ROBB.

Sworn to before me this 26th day of April, 1889.

A. W. ANDREWS,
(27) *Notary Public, N. Y. Ct.* [SEAL.]

237 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, Arthur W. Andrews, a notary public, duly commissioned and sworn and appointed for and residing in the city, county, and State of New York, in the district aforesaid, do hereby certify that the foregoing deposition was taken pursuant to the annexed notice, and that at the time of the taking thereof, viz., on the 26th day of April, 1889, I was attended at the office of Messrs. Strong & Cadwalader, No. 36 Wall street, in the city of New York, by George Hoadly, Jr., Esq., of counsel for the plaintiffs, and W. A. Goodman, Esq., of counsel on behalf of the defendants, and by the witnesses Charles E. Strong and James Hampden Robb, both of sound mind and lawful age, and the said witnesses were by me sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were at the time of taking the same written down by a stenographer, and that the said witnesses afterwards, in my presence, read over the said depositions, written out, and after carefully reading the same they severally subscribed the same in my presence, and did duly swear before me that the same were true.

And I do further certify that I am not of counsel or attorney for any of the parties in said deposition or caption named nor in any way interested in the event of the said cause named in said caption.

And I do further certify that the reason for taking the foregoing depositions is that the said several witnesses live, and did live at the time of taking said depositions, in the city of New York, State of New York, the same being at a greater distance than one hundred miles from the place of trial of said cause.

238 In testimony whereof I have hereunto set my hand and official seal this 26th day of April, A. D. 1889.

A. W. ANDREWS,
(27) *Notary Public, N. Y. Ct. C.* [SEAL.]

Cost Bill.

Stenographer's fees, taking,— writing out depositions at 20c. per 100 words (36 folios)	7 20	
Copy testimony at 10c. per folio	3 00	
		$10 80
Swearing witnesses, 25c. each		50
Postage and other necessary expenses (act'l cost)		18
Commissioner's fees		3 00
		$14 48
Total cost of taking depositions (including stenographer's fees, &c.)		$14 48

239 And afterwards, to wit, on the 25th day of May, A. D. 1889, the following deposition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, Plaintiffs,
vs.
AUGUST VOS and WILLIAM STIX, Defendants.
} Case No. 4148. In Equity.

UNITED STATES OF AMERICA, *Southern District of Ohio*, } *ss:*

Depositions of sundry witnesses taken before me, Frank C. Waltz, a notary public, duly commissioned and sworn and appointed for and residing in the city of Cincinnati, county of Hamilton, in the State of Ohio, in the district aforesaid, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the defendants in an action pending in the circuit court of the United States for the southern district of Ohio, western division, in which James Hampden Robb and Charles E. Strong, trustees, are plaintiffs and August Vos and William Stix defendants.

240 *Q.* Austin Goodman, Esq., of counsel, being present on behalf of defendants, and George Hoadly, Jr., Esq., on behalf of plaintiffs.

Mrs. ELLEN W. ROBB, of lawful age, being by me first duly sworn, deposes as follows:

Direct examination:

Q. Please state your name, residence, and age.
A. Ellen W. Robb; Westwood, Cheviot avenue; will be 71 next Oct.

Q. Are you sometimes spoken of by your relatives and friends as Mrs. Eleanor Robb and Mrs. Wm. Robb?

A. Yes.

Q. What relation do you bear to James Hampden Robb?

A. I am his aunt.

Q. State whether or not you are the party or one of the parties for whom James Hampden Robb and Charles E. Strong are trustees.

A. Yes, I am, and my daughter is the other party.

Q. Please state what information or instructions, if any, you have received from James Hampden Robb in relation to this trust.

A. He always told me to go to Mr. Charles A. Kebler. Mr. Kramer, who acted as my lawyer in the suit we had, also wrote to me to go to Mr. Kebler.

Complainants object to part of the answer referring to communications from Mr. Kramer as being *res inter alios acta*, and otherwise incompetent, immaterial, and irrelevant.

Q. Please state to what transaction you refer when you state that Mr. Hampden Robb always told me to go to Mr. Charles Kebler.

A. There was no other one for me to get the money from.

Q. Please state how much money you were to receive
241 through Charles Kebler by the direction of Mr. Robb, and where it came from.

Complainant- objects to question as assuming that the money was to be paid by the direction of Mr. James Hampden Robb, and otherwise as incompetent, immaterial, and irrelevant.

A. I was to get six hundred dollars a year during my life, and at my death my daughter was to get three hundred dollars a year; it was from that trust shown by the lease from Robb & Strong to Moritz Loth.

Q. From whom did you receive this $600 a year?

A. From Mr. Charles Kebler.

Q. By whom were you informed that Mr. Kebler was to pay you this money?

A. By Mr. James Hampden Robb.

Q. Please state what other information or instruction, if any, you received from Mr. James Hampden Robb with reference to this trust.

A. Nothing else; he always told me whenever I wanted money to go to Mr. Chas. Kebler, and whenever I went to him I always got the money.

Q. Please state whether or not you received this instruction from Mr. Robb verbally or by letter.

A. It was by letter, for I have not seen Hampden Robb since the business was settled.

Q. Have you that letter from Mr. Robb?

A. I don't know that I have; I don't believe I have

Q. Please state how much money in all and up to what date Mr. Charles Kebler paid you on account of the income of this trust fund.

A. I have it all down in this book; it was up to September 21, '87.

242 Q. Please state whether at that time he had settled with you in full to that date. If not, what was done with the balance?

A. No; he had not. He was to come out in two weeks from the 21st of September—which was the last time I saw him—and make a settlement. There was four hundred dollars due which he said he would keep and pay me interest thereon, to which I agreed.

Q. Please state whether or not you have presented any claim for that four hundred dollars against the estate of Charles A. Kebler, and whether this is the claim.

(Paper shown witness, marked Exhibit A.)

Complainants object to the question and exhibit as well as to that portion of the answer to the previous question having reference to the sum of $400 as incompetent, immaterial, and irrelevant.

A. Yes. This is the claim I presented to the administrator of Charles A. Kebler.

Q. Please state whether you received any interest on this trust fund from any other person than Charles A. Kebler up to the time of the death of Charles A. Kebler.

Complainants object to question on the same grounds as last given

A. No. He was the only one.

Q. Then I understand from you that this money received by you from Charles A. Kebler from Feb., 1885, to September 21, 1887, was all the interest you have received on this trust fund. Is this correct?

A. Yes; that was all up to his death. After his death Hampden Robb paid the interest.

Complainants object to question and answer as immaterial, incompetent, and irrelevant.

243 Q. In referring to the money paid to you by Chas. A. Kebler you said that you had made out a statement. Please tell me what became of that statement and where it is, if you know.

Complainants object to the question as assuming facts not in evidence, as leading, and as incompetent, irrelevant, and immaterial.

A. I did not make out any statement.

Q. Have you that lease from Robb and Strong to Moritz Loth or did you have it at any time, and when?

A. I did have it for some time and I sent it to Mr. John Douglas, and he told me this morning he had sent it to Mr. Hoadly's office.

Complainants object to above question and answer as incompetent, immaterial, and irrelevant.

Q. Please state as near as you can the date when you sent this lease to Mr. Douglas.

A. It was some time last fall, but I can't remember the exact date.

Complainants object to question and answer on same grounds as before given.

Cross-examination by Mr. HOADLY:

Q. Please state whether you were ever informed by Chas. A. Kebler or any one else in his lifetime that a suit had been brought to sell the property from which your income under this trust was drawn.

A. No.

Q. Please state, if you remember, when you first heard that
244 such *that such* a suit had been brought or that this property had been sold.

A. Some time last fall.

Q. Please state whether you ever authorized Charles A. Kebler or any one else to consent to the sale of this property.

A. No; I never did.

Q. Please state whether or not this trust fund was created as payment or compromise of a claim due you from the late James Robb.

A. It was.

Q. Please state whether it is not the fact that prior to the creation of this trust payments were made to you on account of this claim by Charles A. Kebler as administrator of the estate of James Robb.

Defendant objects to the above question as irrelevant.

A. Yes; it is the fact.

Q. Please state whether after the creation of this trust the course of dealings whereby you received your income was changed in any respect.

A. No.

Defendants object to the above question and answer as irrelevant.

ELLEN W. ROBB.

It is hereby stipulated *a*by the attorneys for the complainants and defendants that the taking of these depositions be continued until Saturday, May 18, 1887, at 10 a. m.

No witnesses appearing on this day, it is hereby agreed that the *the* testimony is hereby closed under the above notice.

245 UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

I, Frank C. Waltz, a notary public, duly commissioned and sworn and appointed for and residing in the city of Cincinnati, county of Hamilton and State of Ohio, in the district aforesaid, do hereby certify that the foregoing deposition was taken pursuant to the annexed notice, and that at the time of the taking thereof, viz.,

on the 16th day of May, 1889, I was attended at the office — W Austin Goodman, No. 8 and 10 West Third street, in the city of Cincinnati, by George Hoadly, Jr., Esq., of counsel for the plaintiffs, and W. Austin Goodman, Esq., of counsel on behalf of the defendants, and by the witness, Mrs. Ellen W. Robb, who was of sound mind and lawful age, and the said witness was by me sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by me subscribed as above set forth was reduced to writing by myself in the presence of the witnesses and was subscribed by the said witness in my presence and was continued from day to day as set forth; that said deposition was taken at the time and place specified in the notice hereto attached; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 18th day of May, A. D. 1889.

FRANK C. WALTZ,
Notary Pub., Hamilton Co., Ohio. [SEAL.]

Cost for the taking of these depositions, $5.00.
Paid by August Vos.

F. C. WALTZ.

246 & 247 *Notice to Take Deposition.*

UNITED STATES OF AMERICA,
Southern Dist. of Ohio, Western Division, } ss:

JAMES HAMPDEN ROBB and CHAS. E. STRONG, Trustees, Plaintiff-,
vs.
AUGUST VOS *et al.* Defendant-.

Case No. 4148. Pending in Circuit Court of the United States. In Equity.

The above-named plaintiffs will take notice that on Thursday, the 16th day of May, A. D. 1889, the defendant August Vos, above named, will take the depositions of August Vos, Henry Stix, Moritz Loth, Ellen W. Robb, Rufus King, & F. G. Roelker, to be used as evidence in the trial of the above cause, at the law office of W. Austin Goodman, No. 8 West 3rd St., Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

A. B. HUSTON &
W. AUSTIN GOODMAN,
Solicitors for August Vos, Def't.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived, also all exceptions in regard to time.

Done this 13th day of May, 1889.

HARMON, COLSTON, GOLDSMITH & HOADLY, *Attorney- for Complainants.*

248 And afterwards, to wit, on the 12th day of Sept., A. D. 1889, the following deposition of Wm. J. Coppock was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Deposition of Wm. J. Coppock.

249 Notice to take deposition.

STATE OF OHIO, *Hamilton County,* } ss:

JAMES H. ROBB & CHAS. E. STRONG, Trustees, Plaintiff-, *vs.* AUGUST VOS & WILLIAM STIX & MORITZ LOTH, Defendants. } Case No. 4148. Pending in Circuit Court of U. S., So. Dist. of Ohio.

The above-named defendants will take notice that on Wednesday, the 11th day of September, A. D. 1889, the complainants above named will take the depositions of William J. Coppock, sundry witnesses, to be used as evidence in the trial of the above cause, at the law office, in Cincinnati, Ohio, of the undersigned, in the county of ——, in the State of ——, between the hours of 9 o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

HARMON, COLSTON, G. & H.,
Attorneys for Complainant-.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions in regard to time.

Done this 9 day of September, 1889.

WILBY & WALD,
Att'ys for Wm. Stix.
A. B. HUSTON,
Att'y for August Vos.

250 Circuit Court of the United States, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB & CHARLES E. STRONG, Trustees,
vs.
AUGUST VOS, WILLIAM STIX, & MORITZ LOTH.

Deposition of William J. Coppock, taken before me, D. F. Kronacher, a notary public within and for the county of Hamilton and State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the plaintiffs in an action pending in the circuit court of United States, in which James H. Robb and Charles E. Strong are plaintiff- and August Vos, William Stix, and Moritz Loth are defendants, Mr. Edward Colston being present on behalf of plaintiffs and Mr. G. H. Wald on behalf of defendant Wm. Stix, and Mr. A. B. Huston on behalf of defendant August Vos.

WILLIAM J. COPPOCK, being of lawful age, being by me first sworn, deposes and says as follows:

Examination by Mr. COLSTON:

251 Q. Please state you- name, residence, and occupation, and if you are an attorney, and, if so, kindly state how long you have been such attorney and where you have practiced.

A. William J. Coppock. I reside in the city of Cincinnati, Ohio. I am an attorney-at-law and have practiced in the city of Cincinnati for 26 years.

Q. State if you are the administrator of Charles A. Kebler, deceased, and, if so, by what court were you appointed and when your appointment was made.

A. I am the administrator. I was appointed by the probate court of Hamilton county, Ohio, on the 1st of December, 1887.

Q. Did you know Charles A. Kebler in his lifetime; and, if so, how long did you know him next prior to the time of his death?

A. I knew Charles Kebler. I have known him a number of years—since he was in his father's office. After he got through school he came into his father's office next adjoining the office I was in. I knew him from that time until his death, 10 or 12 years.

Q. What was his profession or occupation?

A. He was an attorney-at-law.

Q. Please state if you have made an examination of the assets of the said Kebler from the time of his decease and of his debts, and state whether he died insolvent or solvent, and state also what his condition was as to solvency or insolvency during 1886.

Question objected to in so far as it relates to the time prior to Kebler's death.

A. I made an examination of the assets and an inventory and appraisement of them. I have realized upon the personal
252 estate about $22,000. His homestead on Reading road sold for $20,000, and his interest in what is known as the Oak-

street property is worth about $10,300. The money realized from the sale of personal property included $17,000 that I collected from the insurance companies on policies on his life. The estate is insolvent. In 1886 Mr. Kebler owed about nine thousand seven hundred dollars ($9,700) to S. Kuhn & Sons, to the Hilltop Building Association about $9,000, and to various other persons who have made proof of their claims about $42,000, and he owed about $325 purchase-money on the Oak-St. property. I hold bonds of the Cincinnati, Georgetown and Portsmouth Railroad Company of about $25,000 belonging to the estate.

Q. State whether there are any claims made against Charles A. Kebler in addition to those you mention as debts in your above answer. I mean claims that have not yet been formerly proven, but the existence of which have been made known to you by the parties holding the same.

A. Yes, sir; I think there is something like $50,000 of outstanding claims that I have heard of and that the parties holding them have spoken to me about making proof of them. The largest claim is that of Mrs. Johanna Hamaan, as I understand, about $40,000.

Q. Counting in these claims which have been made known to you, but have not been formerly proven, how would his indebtedness stand at the time of his death?

A. The debts that have been proven and allowed amount to a little over $76,000, and I suppose there will be about $50,000 in addition, making about $126,000 as his total indebtedness. It may be more than that.

253 Q. How far back would this indebtedness of his run of $126,000?

A. $42,000 of it was outstanding in 1886—that is, that much of claims that have already been proven existed in 1886. I am unable to say just how much of the other claims run back that far. I understand Mrs. Johanna Maaman's claim is of considerable long standing.

Objection by Mr. Wald to so much of the answer as gives the witness a- understanding in relation to the Haman claim.

Q. From what source did you derive the understanding you referred to in your last answer?

A. From testimony that was produced at the trial of the case in court, and from conversations with the parties representing Mrs. Haaman at the time the box in the safe deposit was opened and the securities were taken from it.

Q. In other words, this understanding was one you arrived at in the course of your connection with the estate by virtue of your being administrator. Is that correct or not?

A. I suppose so. It is knowledge that I gathered, you know, from the parties speaking about Mrs. Haaman's claim. Mr. Kebler had a number of securities that she claimed and others claimed, and it was while those things were being talked over that I got my impression of it. I haven't any very definite knowledge about it, only

that was the impression I gained from the claims that were made and affidavits that were made by the parties.

Q. What is the character of this indebtedness of $126,000? In other words, what was it for? I don't mean what every dollar was for, but chiefly what was it for, if you know, or if you have become informed by virtue of your connection with the estate as administrator of Chas. A. Kebler?

254 A. The largest part of it was for money Mr. Kebler had received from various persons and had failed to account for—pay back—that is, some of them he sold forged notes to and others he had received the money for investment and did not invest it.

Answer objected to as showing on its face only derived from hearsay.

Q. What relation did the various persons from whom he had received the money last referred to sustain, if any, to Charles A. Kebler at the time he received said moneys from them?

Question objected to on the ground that it is irrelevant and it don't appear that the witness knows to his own knowledge.

A. Some of them were clients, some were members of his family—relatives and persons who had given him the money to invest for them.

Q. What time did Mr. Kebler die?

A. About 1 o'clock in the afternoon, Nov. 23 or 24, 1887.

Q. Was his death expected or unexpected, as far as you know?

A. Unexpected.

Q. Did he commit suicide or did he die a natural death?

A. I understand he committed suicide by taking prussic acid.

Cross-examination by Mr. WALD:

Q. Are the liabilities you speak of, all of them, the personal liabilities of Mr. Charles A. Kebler, or were they or some of them incurred in the name of Kebler & Roelker or Kebler, Roelker & Jelke?

255 A. I believe two claims were proven to be Antioch college claims; that the money was invested by his firm Kebler, Roelker & Jelke. The rest are all his individual liabilities, so far as I know.

Q. What is the amount of these two claims?

A. I don't remember. I can't think.

Q. Do you know about how much?

A. About $5,000. I am not certain.

Q. Is it not a fact that, with regard to the claims not formally proven, it is contended that the liability for them is the liability of the firm of Kebler & Roelker or Kebler, Roelker & Jelke?

A. I don't know. I understand they are going to prove their claim against Kebler's estate.

Q. Was not Kebler practicing law in the firm of Kebler & Roelker and the firm of Kebler, Roelker & Jelke from 1886 to the time of his death?

A. Yes, sir.

Q. Was not the business which was done for the clients done by that firm?

A. I don't know.

Q. Do you know whether or not Mr. Roelker is a solvent man?

A. I understand he is very solvent.

Q. Do you not understand that he is worth individually to exceed $100,000?

A. I never heard it said how much he is worth. I always understood he was worth considerable.

Q. Is not Mr. Jelke a solvent man?

A. I suppose he is. I don't know that he has any property of any considerable amount. I guess he expects it from his father.

256 Q. Do you know what the assets of Charles Kebler were for two or three years preceding his decease?

A. I don't know except as to the real estate and railroad bonds he had. He had them from 1885.

Q. Do you not know what other resources he had from 1885 up to the time of his decease which he might have lost in speculation or squandered?

A. I don't; no.

Q. Is it not a fact that his accounts and check-books are missing so that there is no means of ascertaining with anything approaching exactness what assets he had and what became of them?

A. So far as I know Mr. Kebler never kept any accounts. At least it never came to my hands. I never found any. As far as check-books are concerned I have a large number of his stubs and checks running through several years,

Q. Of the seventy-odd thousand dollars of claims that have been presented to you did you allow all of them?

A. There is that much allowed; yes.

Q. Of the remaining fifty thousand, were they ever presented at all?

A. No, sir.

Q. You therefore, I suppose, cannot tell whether you would allow them on presentation or not?

A. No; I can't.

Q. Is not a large portion, in fact all, of that $50,000 now in litigation against other interests?

A. Some of it is. I don't know whether Mrs. Haaman's claim is in litigation or not. A good many of the others are.

257 Q. In mentioning Mr. Kebler's assets you did not mention his interest in the firm of Kebler & Roelker and Kebler, Roelker & Jelke, did you?

A. No, sir; I did not. Mr. Kebler shortly before his death turned over to his partner Mr. Roelker securities amounting to $40,000 to secure him against liability and pay what he owed the firm and to Mr. Roelker.

Q. Did Robb & Strong ever present a claim to you as administrator?

A. No, sir.

Re-examination by Mr. COLSTON:

Q. How far, if at all, have you examined the merits of this claim of Johanna Haaman amounting to $40,000 and upwards or discussed its merits?

Question objected to.

A. I have not examined it at all. Mr. McDougall, her attorney, has spoken to me about it, saying he had a claim and wanted to know how soon he must prove it, and I told him he had several months yet in which to present it. I know nothing about the details of it or about the several items of it at all.

Q. You don't know any reason, do you, why this claim should not be allowed as a just claim against the estate of Charles A. Kebler?

Question objected to as irrelevant.

A. I don't know anything about the claim nor any reason
258 why it should not be allowed or should be allowed.

Q. From your knowledge and examination into the affairs of Mr. Charles A. Kebler, did he have any more assets in 1886 than he had at the time of his death?

A. I should say not.

WM. J. COPPOCK.

STATE OF OHIO, *Hamilton County,* } ss:

I, David F. Kronacher, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named William J. Coppock was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by Mabel Truesdale and was subscribed by the said witness in my presence; that said deposition was taken at the time and place specified in the notice hereto attached, and that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 12th day of September, 1889.

D. F. KRONACHER,
Notary Public, Hamilton Co., Ohio. [SEAL.]

Received $6.00 notary fees paid by plaintiff's attorneys.
HARMON, COLSTON, GOLDSMITH & HOADLY,
D. F. K.

66.

And afterwards, to wit, on the 20th day of September, A. D. 1889, the following deposition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Deposition of August Vos, Wm. Stix & Moritz Loth.

259 *Notice to Take Deposition.*

STATE OF OHIO, *Hamilton County,* } ss:

JAMES H. ROBB & CHAS. E. STRONG, Trustees, Plaintiff-,
vs.
AUGUST VOS, WILLIAM STIX, & MORRIS LOTH, Defendants.
} Case No. 4148.

Pending in Circuit Court United States, Southern District of Ohio, Western Division.

The above-named plaintiffs will take notice that on Monday, the 16th day of September, A. D. 1889, the def't August Vos, above named, will take the depositions of said defendants, August Vos & Morris Loth & Frederick G. Roelker, sundry witnesses, to be used as evidence in the trial of the above cause, at the law office of W. Austin Goodman & A. B. Huston, No. 8010 West Third street, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

W. AUSTIN GOODMAN &
A. B. HUSTON,
Attorney for Def't August Vos.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions in regard to time.

Done this 9th day of Sept., 1889.

HARMON, COLSTON, GOLDSMITH & HOADLY, *Attorney for Complainants.*

Instructions for Taking Depositions.

Depositions to be used in any Ohio court may be taken in Ohio before a judge or clerk of the supreme court, common pleas or probate court, before a notary public, justice of the peace, police judge, mayor, or chief magistrate of any city or town corporate, master commissioner, or person empowered by a special commission; out of Ohio, before a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any city or town corporate, commissioner appointed by the governor of Ohio to take depositions, or any person authorized by a special commission. Depositions to be used in any district or circuit court of the United States may be taken before any judge of

any United States court, any commissioner of any United States circuit court, any clerk of any United States district or circuit court, any chancellor, justice, or judge of a supreme or superior court, any mayor or chief magistrate of a city, any judge of a county court or court of common pleas of any of the United States, or any notary public, such officer not to be a relative nor of counsel or attorney to either party, nor otherwise interested in the event of the cause.

The depositions must be commenced on the day named, and some portion of a deposition taken on each successive day, Sundays and legal holidays excepted, adjournments being to the day next after the Sunday or holiday, unless otherwise agreed upon.

When depositions are taken under an agreement follow these instructions, except only where they are modified by the agreement.

Begin with the following caption: "Depositions of sundry witnesses taken before me (here name the officer and give his official character, as justice of the peace, notary public, etc.) within and for the county of ——, in the State of ——, pursuant to the annexed (notice or agreement, as the case may be), and at the time and place therein specified, to be read in evidence in behalf of the (pl'ff or def't, as may be), in which —— is plaintiff and —— is defendant, —— being present on behalf of plaintiff and —— on behalf of defendant.

A B, of lawful age, being by me first duly cautioned and solemnly sworn (or affirmed), deposes and says as follows: (Here write the deposition of A B). State, at the beginning of the deposition of each witness, that "(name the witness), of lawful age, being by me first duly cautioned and sworn, deposes and says as follows," as in the case of A B. The depositions may be taken by stating the facts in narrative form or in reply to questions first written down. Each witness must sign and may write his own deposition.

Objections to any question or answer or to any part of either or to any witness should be entered by the officer taking the deposition if either party demands it. This entry briefly states the objection and by whom it is made.

Letters, telegrams, etc., made part of the evidence, must be lettered or numbered consecutively, attached to the deposition, and referred to therein by the witness as "Exhibit A" or "Exhibit No. 1" (or 2, 3, etc.) or otherwise, according to the fact.

Adjournments, if there are any, and the beginning of the cross-examination and redirect examination should be noted by the officer at the time they occur; also any agreements concerning the depositions entered into by the parties to the suit or by their attorneys.

If taken by interrogatories and cross-interrogatories, under agreement or otherwise, these must each be put to the witness and answered so far as he can answer it, and the answer be written down. The deposition must show that each interrogatory and cross-interrogatory was thus put and answered. Attach the interrogatories, etc., as received, to the depositions.

Close the depositions with a certificate in the form following, viz:

"I, F G (stating official character, county, and State, as in caption above), do hereby certify that (naming all the witnesses who have testified) were by me first severally sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by myself (or by said witnesses respectively in my presence; or if by any other person name him and say by —— ——, who is not interested in this suit, in my presence and) in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice (or agreement) specified, and were continued from day to day, as above set forth; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit. In testimony whereof I have hereunto set my hand and official seal this — day of ——, A. D. 18—." (Signed) —— ——.

If the deposition is to be used in any United States district or circuit court the certificate must also state the reasons for taking the deposition, as that the witness lives more than a hundred miles from the place of trial; that he is bound on a voyage to sea; that he is ancient and infirm, etc. His testimony must be reduced to writing by the magistrate taking the deposition or by himself in the magistrate's presence, and by no other person, and the magistrate must certify accordingly. (U. S. Revised Statutes, sec. 863–'4–'5.)

If the depositions are to be read in an Ohio court and are taken before a mayor, notary public, or commissioner appointed as aforesaid, they must be certified under his official seal. If before any of the other officers above named (a special commission excepted), and out of Ohio, a certificate, under the seal of the court of the county or the great seal of the State in which the depositions are taken, must be annexed to the certificate of the officer taking the deposition that he was at the time of taking the same such officer as he represents himself to be in his certificate. This proof of official character is omitted when waived by agreement of the parties at the foot of the notice. This agreement does not waive the taking them at the time and place named in the notice.

The notice or agreement under which the depositions are taken must be attached to the depositions. In cases in U. S. courts the notice must name each witness. In Ohio courts the notice need not name the witness unless the deposition is to be used in his own behalf.

The fees for taking the depositions and postage should be taxed and a memorandum made by whom they were paid.

The whole should be sealed up and endorsed with the title (and number, if known) of the suit and name of officer taking the depositions and in whose behalf taken, and addressed and transmitted by said officer to the clerk of the court where the suit is pending; also indorse on the sealed side, "Sealed up, addressed, and transmitted by me," and sign this across the place sealed.

260 United States Circuit Court, Southern District of Ohio, Western Division.

JAMES H. ROBB and CHARLES E. STRONG, Trustees, Plaintiffs,
vs.
AUGUST VOS, WILLIAM STIX, and MORITZ LOTH, Defendants.
No. 4148.

Depositions of sundry witnesses taken before me, Frank C. Waltz, a notary public within and for the county of Hamilton and State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the defendants in an action pending in the United States circuit court southern district of Ohio, western division, case No. 4148, in which James H. Robb and Charles E. Strong, trustees, are plaintiffs and August Vos, William Stix, and Moritz Loth, defendants, Edward Colston, Esq., being present on behalf of plaintiffs and A. B. Huston, Esq., and G. H. Wald on behalf of defendants.

AUGUST VOS, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Q. Are you one of the defendants in this case.

A. I am.

Q. State if you purchased some property about the 16th of April, 1887, located on west side of Vine street, property in controversy, situated above Mulberry street.

A. I did.

Q. And, if so, under what sale?

261 A. Special master commissioner sale, Geo. Sidney Tyler, case No. 74375, Ham. com. pleas court, purchased at the sale made under the printer's notice hereto attached, made part of my evidence and marked "Exhibit A."

Q. How much did you pay for that property?

A. I paid for the property on May 9, 1887, $9,100.00 cash.

Q. To whom did you pay that money?

A. To Geo. Sidney Tyler, special master commissioner.

Q. State whether or not you had the title examined.

A. I did.

Q. Who examined it?

A. W. Austin Goodman.

Q. State whether or not at the time you purchased this property and paid for it you had any knowledge that James H. Robb and Charles E. Strong, trustees, plaintiffs, were represented in the suit in which this property was sold by Chas. A. Kebler, of the firm of Kebler & Roelker, or the firm of Kebler, Roelker & Jelke, without the knowledge, consent, or authority of said Robb & Strong, trustees.

A. I did not.

Q. When did you get possession of this property?

A. I took possession of the property at the time the payment was made, May 9, 1887.

Q. How was this property improved at that time?

A. By three four-story brick buildings.
Q. Have you had possession ever since?
A. I have.
Q. To what extent, if any, have you repaired or improved that property?
262 A. I can't estimate exactly the amount. I suppose the amount to be upwards of $500 that I expended.

Cross-examination by Mr. COLSTON:

Q. Are you an attorney-at-law admitted to practice in Cincinnati, Hamilton county, Ohio?
A. I am not.
Q. Are you an attorney authorized to practice law?
A. I am, by virtue of license granted me by Kenton county, Kentucky, chancery court.
Q. When were you admitted to practice law by the chancery court of Kenton county in the State of Kentucky?
A. I think it was in the year 1875.
Q. Did Mr. W. Austin Goodman furnish you a written opinion to the effect that if you purchased the property in controversy in this case at this sale you would get a good title thereto, including the fee-simple title of Robb & Strong?
A. He furnished no opinion before the sale. I placed it in his hands for examination after the sale. The representation of Mr. Charles A. Kebler at the time of the sale was that the property was to be free, clear, and unincumbered.
Q. Did you hear him make such representation; if so, where?
A. I did; at the time and place of sale on the premises.
Q. How did he come to make such statement to you?
A. The statement was made upon the question being asked and announced by the master commissioner.
Q. Who asked the question and of whom was it asked?
A. My impression is that I asked the question myself of Mr. Kebler.
263 Q. Well, what did Mr. Kebler say, if anything?
A. That the title was clear, free, and unincumbered, or else it would be no sale, giving the privilege of examining the title.
Q. How did you come to make the query of Mr. Kebler?
A. Because the law firm that he was connected with represented both Robb & Strong, trustees, and Wm. Stix.
Q. How do you know that Kebler's firm represented Robb and Strong at that time?
A. Because he said so—Mr. Kebler.
Q. Did Chas. A. Kebler tell you prior to your bid on this property that he represented Robb & Strong, trustees, or the interest of Robb and Strong, trustees, in this land?
A. He did prior to my bid, and, furthermore, from a memorandum which Chas. A. Kebler furnished Henry Stix and A. J. Friedlander prior to the sale.

Q. How long prior to the sale was this memorandum furnished to these two men?

A. My recollection of it is that it was between the time the advertisement appeared in the paper and the date of sale, and how long before the date of sale I cannot say.

Q. How did Kebler come to furnish this memorandum and how did you come to know about this memorandum and when did you acquire your knowledge of it?

A. He furnished the memorandum to Mr. Stix, and as A. J. Friedlander & B. Bettman had a mortgage against other property to be sold in the same suit Mr. Stix delivered the memoran-
264 dum to A. J. Friedlander, and my being book-keeper for him at that time it came into my possession.

It was between the date of publication and date of sale the memorandum was furnished for the purpose to protect their mortgage interest in the other property.

Q. What was the memorandum, & have you got it with you?

A. I haven't got it with me. It gave a statement of the heirs and their estimated amounts in their order; I think that is about it.

Q. Will you make diligent search for that memorandum in every place where it — likely to be and, if you find it, bring it here at the time to which this deposition shall be adjourned?

A. I will.

Q. How did you come to make any inquiry just at the time of the bidding about Robb and Strong, if you made any?

A. In order to satisfy myself that the title was all right.

Q. What inquiry did you make at that time about Robb and Strong or their interest, and what had you learned about them or it?

A. I made no inquiry at the time of the sale about Robb & Strong or their interest- at the time the bid was made.

Q. Prior and up to the time of sale what knowledge did you have as to Robb and Strong or as to their title to this land, and from what source did you acquire whatever knowledge you had?

A. It was only from the memorandum heretofore spoken of; that contains all the knowledge I had.

Q. That memorandum was not furnished for you?

A. Not for me; no, sir.

Q. Now state all that Kebler said about Robb & Strong or
265 about their title or about his representing them at the time the sale was made.

A. My impression is that he said his firm represented Robb and Strong, trustees, as their attorney-, and that the title was clear, free, and unincumbered. He said the title would be free, clear, and unincumbered; the conditions of the sale was such; that's what the master commissioner stated.

Q. Did the master say that on Kebler's suggestion?

A. He did.

Q. How long after the sale did you employ W. Austin Goodman to examine the title, and did he furnish you any written report or

opinion or abstract that the title was good—that is, that you would take a good title?

A. It was very shortly after the sale—a few days—he gave me his opinion in writing; it was given just before the check was dated. He may have given me his oral opinion before the check was dated.

Q. What, if anything, did he say about the right of Kebler or his firm to accept service of summons in the case in which the property was sold for Robb & Strong?

A. I don't remember; I don't think he said anything; I am satisfied the subject was not brought up at all.

Q. Then he did not tell you that the record did show that fact, viz., that Robb & Strong had never been served with summons in that case otherwise than by Kebler or Kebler's firm having accepted service of the summons?

A. He did not, but reported the proceedings in that case regular.

266 Q. Did he tell you that no publication had ever been made in that case against Robb and Strong, non-residents, to bring them into court in that case?

A. He did not.

Q. Did he tell you that the record of that case showed by the answer filed by Kebler purporting to be for Robb & Strong, trustees, that they were non-residents of the State of Ohio?

A. No.

Q. Did he tell you that you could not acquire the title of Robb and Strong in that property unless Kebler or his firm had authority in fact to represent Robb & Strong and to consent for them that this property should be sold clear and free of their title?

A. He did not.

Q. Did he tell you that there was any such question affecting their title?

A. He did not.

Q. You speak of taking possession of this property. How did you take possession of it and what constitutes the taking possession you speak of?

A. Mr. Tyler made a settlement with me of the rents since the 16th day of April, 1887, the date of sale, to the date of the payment—purchase-money. Tyler had been appointed receiver to collect the rents in addition to the being master commissioner. I then notified the tenants in possession to pay me, which they have done ever since. I also paid the taxes on the property.

Further taking of this deposition continued to Sept. 17, 1889, at 10 o'clock a. m.

267 Q. Have you brought here the memorandum spoken of yesterday? If so, kindly produce it so that I may examine it.

A. I have brought the copy of the memorandum. I was under the impression I had the original, but find that it is a copy made by me at the time I saw the memorandum and returned the original to Mr. Stix.

Q. You will observe the date of this copy of memorandum is Sep. 4, 1886; was that the time spoken of yesterday by you at which you saw the original memorandum?

A. I stated yesterday that it was my recollection that I saw this memorandum between the date of publication and date of sale and find, however, on hunting up the memorandum that it was about Sept. 4, 1886, or a few days thereafter, that I saw the original. I correct my former answer that way.

Q. Did this Henry Stix, to whom this letter of September 4, 1886, spoken of in this deposition as a memorandum, is addressed, represents Wm. Stix, so far as the property in controversy is concerned, at the time the memorandum was delivered to him?

A. As far as I know, he did.

Q. State what you know about it.

A. Stix was there at the time of the sale bidding upon the property, either through Kebler or personally.

Q. Will you attach this copy, dated Sep. 4, 1886, as an exhibit to your deposition herein?

A. I do so now and marked the same "Exhibit No. B," hereto attached.

268 Q. Had you produced the opinion from Mr. W. Austin Goodman on the title of this property you spoke of yesterday; if so, will you attach the same or a copy thereof as an exhibit to this deposition?

A. I have now produced the original and will attach a copy of it as an exhibit to this deposition and the same is hereto attached and marked Exhibit "C."

Redirect examination:

Q. When you saw the memorandum referred to and took a copy of it did you have any idea of bidding on the property?

A. This memorandum was furnished by Mr. Stix to A. J. Freidlander for the purpose of enabling them to bid intelligently to protect their mortgage on other property in that com. pleas suit; of course, I might have had some idea about bidding upon it if it was cheap enough. I don't remember exactly.

Q. How did you come to make the copy—at whose request?

A. I made a copy at the request of Mr. A. J. Freidlander, as his book-keeper. I suppose Mr. Friedlander got the original from Henry Stix. Mr. Friedlander had a mortgage on the property also sold in that com. pleas suit.

AUGUST VOS.

269 MORITZ LOTH, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Q. What is your name?

A. Moritz Loth.

Q. Are you the defendant of that name in this case?

A. Yes, sir.

Q. Where do you reside?

A. In Cincinnati, O.

Q. How long have you resided in Cincinnati?

A. Since 1859.

Q. Then you have been a citizen of the State of Ohio since that time?

A. Yes, sir.

Q. Look at the document shown you and state what it is, and attach to this deposition as a part of your evidence.

A. It is a deed from myself and wife to James Hampden Robb & Charles E. Strong, trustees, of property involved in this case and dated Feb. 5, 1885, and I attach the same, marked Exhibit "D."

Q. Just state what that transaction was—the nature of it.

A. Mr. John Kebler and Judge Hoadly, of this city, had money to dispose of in their possession and I, needing the money at that time, was informed of that fact by Rufus King, of this city, who was aware that I wanted to raise some money, and Mr. King told me that Mr. John Kebler and Judge Hoadly had money to
270 loan out. I called on John Kebler and the result of my interview with him on the subject was the execution of a deed for $10,000, and they gave me back a lease of the same property with a privilege of purchase.

Q. The deed that I have shown you was the deed that was executed at that time?

A. Yes, sir; of course it is.

Q. Then the lease and the deed were a part of the same transaction?

A. Yes, sir; the deed was executed at the time for the purpose of getting a lease back with the privilege of purchase.

Q. Was this transaction an absolute sale of the property or was it put in the form of deed and lease back for the purpose of securing the loan of $10,000 in lieu of mortgage?

A. The transaction of the execution of the deed for $10,000 and the lease was one transaction. My idea was to make Messrs. Robb and Strong, trustees, secure for their money and myself secure for the additional advantage of having control of the property under the lease with the privilege of purchasing it back.

Q. Was the property included in this transaction more or less valuable than the amount of $10,000?

A. Yes; I considered the property valued at more than $10,000.

Q. Have you the lease referred to?

A. No; I don't think I have; it is on record.

271 Cross-examination:

Q. How much, in your judgment, was the property worth in excess of $10,000?

A. I can't tell, but I would not have taken $10,000 as a sale at the time.

MORITZ LOTH.

The further taking of these depositions continued until September 18, 1889, at one o'clock, at which time MORITZ LOTH — recalled for further examination by attorney for August Vos and testifies as follows:

Q. Did you pay any rent under the lease from Robb and Strong, trustees, to you already referred to in your examination yesterday; and, if so, how much, to whom? And if you have a receipt therefor produce it and make it or a copy thereof a part of your evidence.

Plaintiffs' attorney objects as irrelevant and immaterial.

A. By referring to my papers and my cash book and ledger I found a receipt for $300 due for rent on a lease for six months which I paid to Messrs. Kebler & Roelker, att'ys for Strong & Robb, trustees, and Mrs. Ellen Robb. I produce the receipt and make it a part of my evidence, marked Exhibit No. E, hereto attached.

Q. What is the date of that receipt?

A. August 5th, 1885.

Q. Was any entry made on your cash book of that payment of $300?

Plaintiffs' attorney object- as irrelevant, immaterial.

272 A. I find in my cash book No. 1 A, page 383, Aug. 17, 1885, interest on loan of Robb & Strong, $300.00.

Answer objected to by plaintiffs' attorney as irrelevant and immaterial.

Q. State what your books show as to the $10,000.00 you testified to yesterday you received from Mr. Kebler.

Same objection as last.

A. I find my cash book No. 1 A, 126, debit side, 1885, Feb. 9, John Kebler, att'y for Robb, $10,000. My ledger, page 516, J. Hampden Robb & Charles E. Strong, trustees, John Kebler, att'y, 1885, Feb. 9th, by cash $10,000.00.

Answer objected to for same reasons as above.

Q. Was this the only transactions you had with Robb & Strong or John Kebler or Kebler & Roelker for Robb & Strong?

A. I never saw Robb & Strong. My transactions were with John Kebler first, and also with Charles A. Kebler. This was the only transactions I had referring to this matter.

Q. I see that your entry in cash book of August 17, 1885, differs in date from the date of receipt, which is August 5, 1885. Please explain that.

Question objected to as irrelevant and immaterial.

A. Well, I presume the rent was due Aug. 5th, 1885, but not actually paid until the 17th August, 1885. It's the same transaction.

Q. I see that your entry of that payment is "int. on loan of Robb & Strong, $300." What do you mean by the word- "int. on loan"?

Objected to as incompetent.

A. Well, I always considered the $10,000 as a loan and the
273 $300 as interest, though paid in the form of rent.

Q. Was it or not understood between you and Mr. Kebler at the time you got this $10,000 that it was a loan?

A. It was understood that it was a loan in the form of a lease.

Cross-examination:

Q. Is the receipt you produce of date August 5, 1885, in the handwriting of Chas. A. Kebler? Did you pay the $300 therein mentioned to him or did you pay it to Robb & Strong or Mrs. Ellen Robb?

A. I believe the receipt was written by Mr. Chas. A. Kebler, and I am positive I paid the money to him.

Q. Did you ever see Robb or Strong or Mrs. Ellen Robb or have any intercourse of any sort with any of them in regard to this transaction or the $10,000 transaction here?

A. I never saw any of these persons, and I do not remember that I ever had any communication with them except through John and Charles Kebler.

Q. What I desire to get at is, if you have any knowledge from Robb and Strong of Kebler having any authority to represent them.

A. No other knowledge except that they acted for them in examining the title to the property in question at the time of the loan and executing the deed and lease.

Q. Who made the entry in your cash book No. 1 A, page 293, "interest on loan of Robb & Strong, $300"—by whose direction and where was it made?

A. My book-keeper made it by my direction in my office, at No. 50 West Pearl street, Cin., O.

274 Q. Who made the entry in your cash book No. 1 A, 136, Feb. 9, 1885, charging "John Kebler, att'y, $10,000," by whose direction, and where?

A. I answer the same as last.

Q. When did John Kebler die?

A. He died, but I can't tell when. It was prior to the death of Charles A. Kebler.

M. LOTH.

THE STATE OF OHIO, } ss:
Hamilton County, }

I, Frank C. Waltz, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named August Vos and Morits Loth were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed as above set forth were reduced to writing by myself in the presence of the witnesses respectively and were subscribed by the said witnesses respectively in my presence and were continued from day to day as above set forth: that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof *U* have hereunto set my hand and official seal this 19th day of Sep., A. D. 1889.

FRANK C. WALTZ,
Notary Public, Hamilton Co., Ohio. [SEAL.]

Received of August Vos the sum of $7 in full of my fees.
FRANK C. WALTZ.

275–279 Copy.

EXHIBIT "E."

John Kebler, Charles A. Kebler, Frederick G. Roelker, P. O. box 540.

Kebler, Kebler & Roelker, attorneys and counsellors at law, 5 West Fourth street.

CINCINNATI, *August* 5, 1885.

Received of M. Loth, Esq., three hundred dollars rental due this date under lease made Feb. 5, 1885, in which J. H. Robb & C. E. Strong, trustees, are lessors and M. Loth, Esq., is lessee.

$300.00. KEBLER & ROELKER,
Attorneys for Strong & Robb, Trustees, & Mrs. Ellen Robb.

280 Ex. D.

Know all men by these presents that Moritz Loth and Fredericka Loth, his wife, in consideration of ten thousand dollars and other valuable considerations to them paid by James Hampden Robb and Charles E. Strong, trustees, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said James Hampden Robb and Charles E. Strong and the survivor of them and the heirs and assigns of them and the survivor of them all the following parcels of real estate, all situ-ted in the city of Cincinnati, Hamilton county, Ohio, on the westerly side of Vine street north of Mulberry street, viz: Lots marked and numbered (3) three, four (4), & five (5), of twenty feet front each, of the subdivision of a tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Finley, thence running south on Vine St. one hundred feet and extending back westwardly of same width one hundred and thirty-two feet, commencing for numbers from the south, making five lots of twenty feet front each, said lots 3, 4, & 5 hereby conveyed being 60 feet in front on the west side of Vine street,
281 said lots 3, 4, & 5 hereby conveyed being the same conveyed to the grantor by John Shelley by deed recorded in Book 401, page 382, and also by E. B. Reeder by deed recorded in Book 401, page 38, of the records of Hamilton county, and to said John Shelley by D. Wolf by deed recorded in Book 246, page 269, of said records; also all that other real estate in said city of Cincinnati, viz: All that part of lot marked and numbered two (2), block twelve (12), on the plat of subdivision laid out by Gen'l James

Finlay, J. C. & Q. L. Ludlow, recorded in Book 49, page- 420, 422, as now subdivided by the commissioners in case of partition of James & Jane Finlay, which fronts fifty feet on the west side of Vine street and extending westwardly of same width in rear as in front to the depth of one hundred feet, which lot two (2), in said block (12), Finlay and Ludlow subdivision, was set off by the Finlay commissioners to John King Finlay and was conveyed by said John King Findlay to the grantor by deed recorded in Book 358, page 571, Hamilton county records, the grantors hereby conveying that part of said lot 2, block 12, of Findlay & Ludlow's subdivision, which fronts 50 feet on the west side of Vine street by 100 feet deep; also all that other lot in the city of Cincinnati aforesaid; all that part
282 of lot numbered four (4) on the plat of subdivision made by Findlay commissioners of block numbered twelve on the said plat of subdivision laid out by Findlay & Ludlow as fronts fifty feet on the west side of Vine St., extending back westwardly of even width in rear as in front to the depth of one hundred feet, said fifty feet front on the west side of Vine street by one hundred feet deep hereby conveyed, part of said lot 4, in block 12, of Findlay & Ludlow subdivision, having been set off with the rest of said lot 4 by Findlay commissioners to James F. Irwin and conveyed by the latter to the grantor by deed recorded in Book 389, page 320, Hamilton county records; also all that other lot in the city of Cincinnati aforesaid adjoining the easterly line of the lot last described, fronting — (17) feet on the west side of Vine street, running back westwardly of even width in rear as in front to the depth of one hundred feet, said lot hereby conveyed being off the westerly part of lot number five as marked by Findlay commissioners on a plat of subdivision of block twelve of Findlay & Ludlow subdivision aforesaid; said lot No. 5 was set off by Findlay's commissioners to Wm. Irvin, the lot hereby conveyed being all that property conveyed to the grantor herein by the Franklin Bank of
283 Cincinnatti by deed recorded in Book 401, page 381, of the records of Hamilton county, Ohio, and all the estate, title, and interest of the said grantors, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the only proper use of the said James Hampden Robb and Charles E. Strong and the survivor of them and the heirs and assigns of them or of the survivor of them; and the said Moritz Loth, for himself, his heirs, executors, and administrators, does hereby covenant with said James Hampden Robb and Charles E. Strong and the survivor of them and the heirs and assigns of them or of the survivor of them that he is the true and lawful owner of the said premises and has full power to convey the same; that the title so conveyed is clear, free, and unincumbered; and, further, that he does warrant and will defend the same against all claim or claims of all persons whomsoever.

In witness whereof the said Moritz Loth and Fredericka Loth, his wife, who hereby release all right and expectancy of dower in

said premises, have hereunto set their hands and seals this fifth day of February, in the year of our Lord one thousand eight hundred and eighty-five.

MORITZ LOTH. [SEAL.]
FREDERIKA LOTH. [SEAL.]

Signed and sealed in presence of us—
JOHN KEBLER.
FERD. JELKE, JR.

284 THE STATE OF OHIO, } ss:
County of Hamilton, }

Be it remembered that on the 6th day of February, in the year of our Lord one thousand eight hundred and eighty-five, before me, the subscriber, a notary public in and for said county, personally came Moritz Loth and Frederika Loth, his wife, the grantors in the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

And the said Frederika Loth, wife of said Moritz Loth, being examined by me separate and apart from her said husband and the contents of said deed being by me made known and explained to her, as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith, as her voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

FERD. JELKE, JR.,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

(Endorsed on cover:) Exhibit "D." Warranty deed from Moritz Loth to J. Hampden Robb and others. Gen'l index B'k 28, p. 68–124. Transferred. Not necessary. 18—. Applegate, county auditor. Presented for record on the 7th day of Feb., 1885, at 10.50 o'clock a. m. Recorded Feb. 17, 1885, in Deed Book # 577, p. 569. Geo. Rahenstein, county recorder.

285 EXHIBIT "C."

W. Austin Goodman, attorney-at-law, No. 8 Third street.

CINCINNATI, *May* 6, 1887.

August Vos, Esq.

DEAR SIR: I have finished the examination of title to lots 3, 4, and 5 of Reeder's block 68, above Mulberry St., being sixty by one hundred and thirty-two (60 x 132) feet on the west side of Vine street, and find that your title thereto will be all right under the sale, provided the decree of confirmation and distribution is properly drawn and provides for the forfeited taxes, etc. Kebler has

promised to submit the decree to me this afternoon, so that everything can be closed to-morrow morning.

Yours truly, W. AUSTIN GOODMAN.

286 EXHIBIT "B."

Copy.

Office of Heidelbach, Freidlander & Co., 129 W. Third street.

CINCINNATI, *Sept.* 4, 1886.

Mr. Henry Stix.

DEAR SIR: I should before this have given you a description of the Loth property covered by Mrs. Robb's lien, but the papers in the Loth case were taken from my office during my absence and have only just been returned to me. The property covered by the deed made to the trustees for Mrs. Robb is as follows:

1st. 60 feet on the west side of Vine street by 132 feet in depth.

2nd. 50 feet on the west side of Vine St. by 100 f't in depth.

3rd. 50 feet on the west side of Vine street by 100 feet in depth.

4th. 17 feet on the west side of Vine street by 100 feet in depth.

This property covers the houses 825, 827, 829, 847, 849, 855, and 857 Vine street and a vacant lot besides, and is the first lien upon all of it except 857 and 859 Vine street, upon which Henry W. Taylor has the first lien for $8,000.00.

Henry W. Taylor has besides that 50 feet on Vine street, on which he also has the first lien, and he could be compelled to exhaust that vacant 50 feet before touching any property covered by the Robb lien, should that become necessary to protest the interests of the property holding the Robb lien.

287 Your mortgage covers the entire property covered by the Robb and Taylor liens and is a second lien thereto, and you have in addition 110 feet on the west side of Loth St. by 100 feet in depth upon which you have the first lien. The amount due to Mr. Robb is ten thousand dollars, with six per cent. interest, payable semi-annually, from August 1, 1885.

Trusting that I have made clear to you the position of the different parties and the property covered by the various liens, I am, very sincerely,

(Signed) CHARLES A. KEBLER.

288 EXHIBIT "A."

Special Master Commissioner's Sale.

STATE OF OHIO, *Hamilton County,* } ss:

Pursuant to the command of an order for sale from the Hamilton common pleas court and to me directed, I will offer at public sale, on the premises, in the city of Cincinnati, on Saturday, the 16th day of April, A. D. 1887, at 2 o'clock p. m., the following-described real estate, to wit:

In Cincinnati, Hamilton county, Ohio, being parts of lots 5, 6, and 7 in plat N made by commissioners in partition of the estate of Jane and James Findlay, in causes No-. 9569 and 9570, of Hamilton common pleas court, as recorded in volume 222 of said records, said lots 5, 6, and 7 being part of block 12 in Findlay & Ludlow's plat, recorded in Book 49, page 420, Hamiltom county records, the parts of said lots to be sold described as follows:

Commencing at a point on the west side of Vine street 17.41 feet north of the southeast corner of said lot 5, thence west on a line parallel with the south line of said lot 100 feet to a point; thence north on a line parallel with Vine street 82.59 feet to the north line of said lot 6; thence east along the north line of said lot 6 100 feet to the west side of Vine street, and thence south along the west side of Vine street 82.59 feet to the point of beginning, valued at $10,303.60.

Also 44 feet, more or less, on the west side of Vine street,
289 part of lot 7 aforesaid, being all the space between the southerly line of lot formerly owned by M. Plunket, and the north line of lot 6 aforesaid, and running back west along the south line of lot 7 90 feet in depth, being narrower in rear than in front, valued at $7,000.

Also the following-described real estate in the aforesaid city, county, and State on the west side of Vine street, north of Mulberry street, viz: Lots numbers 3, 4, and 5 of 20 feet front each of the subdivision of the land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine St. 100 feet, extending back west of the same width 132 feet, commencing for numbers from the south, making 5 lots of 20 feet front each, said lots 3, 4, and 5 herein described being 60 feet front on the west side of Vine street, and being the same conveyed to the said Moritz Loth by John Shelley by deed in Deed Book 401, page 382, Hamilton county records, valued at $12,000.

Also all the other real estate in the aforesaid city, county, and State: All that part of lot 2 of block 12 on the plat of subdivision laid out by General James Findlay and J. C. & J. L. Ludlow, recorded in Book 49, pages 420 to 422, Hamilton county records, as said block 12, is now subdivided by commissioners in partition of the estate of Jane and James Findlay, which fronts 50 feet on the west side of Vine street and extending back westerly of same width in rear as in front, 100 feet said lot 2 having been set off by said Findlay's commissioners to John King Findlay and conveyed by said John King Findlay to Moritz Loth by deed, Book 358, page
571, Hamilton county records, valued at $40 a foot.

290 Also all that real estate in the aforesaid city, county, and State described as follows: All that part of lot 4 on the plat of subdivision made by Findlay's commissioners of block 12 of said subdivision made by Findlay and Ludlow as fronts 50 feet on the west side ot Vine street, extending back west of even width in rear as in front 100 feet, all of said lot 4 having been set off by said Findlay's commissioners to James F. Irwin, and by him conveyed

to Morris Loth by deed in Deed Book 389, page 320, Hamilton county records, valued at $40 a foot.

Also all that real estate adjoining the easterly line of lot last described fronting 17 feet on the west side of Vine street and running back of even width in rear as in front 100 feet, said 17 feet being off the west part of lot 5, as marked by Findlay's commissioners on a plat of subdivision of block 12 of Findlay & Ludlow's subdivision, said lot 5 being set off by said Findlay's commissioners to Wm. Irwin, and the 17 feet herein described being conveyed to Moritz Loth by the then Franklin Bank of Cincinnati by Deed Book 401, page 381, Hamilton county records, valued at $40 per foot.

Also the following-described real estate, viz: The south 25 feet of lot 96, lot 97, and the north 35 feet of lot 98 on the west side of Fox (now Loth) street in the subdivision of lots among the heirs of James and Jane Findlay of block 11 of Findlay & Ludlow's subdivision, the real estate above described fronting 110 feet on the west side of Loth street and running back of even width in rear as in front to the west line of said lots, and being part of the same premises conveyed to Moritz Loth by William Rankin and wife by deed in Deed Book 401, page 387, Hamilton county records, valued at $50 per foot.

291 To be sold by order of court in case in which Meyer Gugenheim is plaintiff and Morris Loth *et al.* are defendants.

Case No. 74375.

Terms of sale: One-fourth cash, balance in equal payments at 1, 2, and 3 years from date of sale, deferred payments to bear interest, payable annually, and secured by purchase-money mortgage on the premises sold or all cash at purchaser's option.

GEORGE SIDNEY TYLOR,
Special Master Commissioner.

KEBLER, ROELKER & JELKE,
PERRY & JENNE,
LINCOLN, STEPHENS & LINCOLN, AND
CAMPBELL & BETTMAN, *Attorneys.*
SCHMIDT & WEBER,
Auctioneers, 448 *Main St.*

And afterwards, to wit, on the 26th day of November, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 490.

On motion of the complainants and for good cause shown, it is ordered by the court that this cause and cause numbered 4182 in this court between the same parties in interest be, and they are hereby, consolidated, and that all further proceedings in said
292 consolidated cause be had in and under the number of this cause, 4148.

And afterwards, to wit, on the 26th day of November, A. D. 1889, the following exhibits were filed in the clerk's office of said court, clothed in the words and figures following, to wit:

293 State of Ohio, Hamilton County, Court of Common Pleas.

W. J. COPPOCK, Adm'r of the Estate of Charles A. Kebler, Deceased, Plaintiff,
vs.
JOHN KEBLER, a Minor Aged 9 Years, and LEONARD Kebler, a Minor Aged 5 Years, Children of Charles A. Kebler, Deceased; Frederick G. Roelker, The Hill Top Building Savings and Loan Company, a Corporation, Defendants. } 79812. Petition.

Said plaintiff, Wm. J. Coppock, administrator of the estate of Charles A. Kebler, deceased, says that said Charles A. Kebler departed this life November 23rd, 1887, and this plaintiff has been duly appointed and qualified administrator of his estate; that the personal property and effects belonging to said estate will not amount to more than thirty thousand dollars; that the indebtedness of said estate will amount to more than one hundred and fifty thousand dollars; that the expenses of administering said estate will amount to at least one thousand dollars; that the per-
294 sonal property and effects are insufficient to pay the debts of said estate.

Plaintiff further says that said Charles A. Kebler died owning and seized in fee simple of the following real estate situated in the city of Cincinnati, in Hamilton county, Ohio, to wit:

"The equal undivided one-half of all that lot in section 14, town. 3, fractional range 2, in the Miami purchase, beginning at the southwest corner of Bel-eview avenue and Oak street, thence west along the south line of Oak street four hundred and six feet, more or less, to the corner of Eden avenue, one hundred and sixty-eight feet, more or less, to the north line of the subdivision made by the city of Cincinnati; thence east along said north line and parallel with Oak street four hundred and six feet, more or less, to the west line of Belleview avenue, thence north with the west line of Bel-eview avenue one hundred and sixty-eight feet, more or less, to the place of beginning, reference being had to the plat of subdivision made by William Burnett and recorded in Book 112, page 621, Hamilton county records. Also the undivided one-half of the following real estate in said city of Cincinnati and described as follows: Lots number sixty-seven and sixty-eight, in the city of Cincinnati, subdivision of Burnett Workhouse lot, as shown and recorded in Plat Book 5, page 10, Hamilton county records, and being the same premises described in deed made by Truman B. Handy to Charles A. Kebler and Frederick G. Roelker, recorded in Book 541, page 295, excepting however from said premises a lot sold and conveyed to Maria E. Eckelmann, as shown by deed re-

corded in Book 640, page 18, and also excepting the property
295 sold and conveyed to E. S. A. Razall by deed recorded in Book 585, page 638, in the office of the recorder of Hamilton county, Ohio, and in Deed Book 589, page 233, of said Hamilton county, Ohio, records.

And the plaintiff further says that said Charles A. Kebler died seized of and owning in fee simple the following-described real estate in said city of Cincinnati, being part of lots numbered seventeen and eighteen in Christian Donaldson's revised plat of Vernon village, as recorded in Deed Book 101, page 475, Hamilton county, Ohio, records, and in the southwest quarter of section 8, town 3, fractional range 2, in the Miami purchase, bounded as follows: Beginning at a point in the west line of the Cincinnati and Lebanon turnpike at the north line of lot number seventeen in said subdivision; thence west on the north line of said lot number seventeen (17) two hundred and forty-four & $\frac{37}{100}$ (244.37) feet, more or less, to a point fifty feet east of the northwest corner of said lot number seventeen (17); thence south parallel with the west line of lots number seventeen (17) and eighteen (18) two hundred (200) feet to the south line of lot eighteen; thence east on the south line of lot number eighteen (18) fifty (50) feet; thence north parallel with the west line of lots seventeen (17) and eighteen (18) one hundred and four (104) feet; thence east parallel with the south line of lot seventeen (17) one hundred and ninety & $\frac{74}{100}$ (190.74) feet, more or less, to the west line of the Cincinnati and Lebanon turnpike; thence north along said west line of said turnpike ninety-six & $\frac{7}{100}$ (96.07) feet to the place of beginning.

296 Plaintiff further says that it is necessary to sell the above-described real estate of said Charles A. Kebler, deceased, and that said Charles A. Kebler died leaving no widow surviving him, and that he left surviving him said defendants, John Kebler and Leonard Kebler, his only children, who have the next estate of inheritance in said above-described real estate.

Plaintiff further says that the defendant, The Hill Top Building, Saving-, and Loan Company, claim to have a lien on said property situated on said Cincinnati and Lebanon turnpike by virtue of two certain mortgages held by it; that the defendant, Frederick G. Roelker, claims to have a lien on all of said above-described real estate under and by virtue of two certain deeds, one recorded in Book 641, page 351, and the other in Book 642, page 302, in the office of the recorded of Hamilton county, Ohio, which said deeds were intended as, and in fact are, mortgages given to secure certain indebtedness owing by said Charles A. Kebler to said Frederick G. Roelker.

Plaintiff further says that he cannot state the amount due or owing to said The Hill Top Building, Savings, and Loan Company to said Frederick G. Roelker, and he asks that they be required to answer and set forth their respective claims, and that they — ascertained and determined by this court.

Wherefore plaintiff asks for authority, all of said above-described real estate free of the claims of the several parties hereto, for the

payments of the debts of said estate, and he asks for all other proper relief.

297 ISAAC B. MATSON,
COPPOCK & HAMMEL,
Att'ys for Plaintiff.

STATE OF OHIO, *Hamilton County,* } ss:

W. J. Coppock, plaintiff, being first duly sworn, says the facts stated in the foregoing petition are true, as he verily believes.

W. J. COPPOCK.

Sworn to before me and subscribed in my presence this 10th day of December, 1887.

DANIEL J. DALTON,
Clerk Com. Pleas Cou-ty, H. C., O.,
By W. H. SARGENT, *Dep.*

Precipe to Clerk.

Issue summons on the within petition for the defendants therein named, endorsed action for sale of real estate, & other relief.

ISAAC B. MATSON.
COPPOCK & HAMMEL.

298 STATE OF OHIO, *Hamilton County,* } ss:

Common Pleas Court.

I, John B. Peaslee, clerk of the court of common pleas within and for the county and State aforesaid, do hereby certify the within and foregoing to be a true and correct copy of the petition filed December 10th, 1887, as recorded in vol. 53, Common Pleas Records, page 378, as appears of record now in my office, in the case No. 79812, wherein W. J. Coppock, adm'r, etc., was plaintiff, and John Kebler, a minor, etc., *et al.* were defendants, as appears from the files and records now in my office.

Seal Common Pleas Court of the County of Hamilton, Ohio.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Cincinnati, this 22d day of September, A. D. 1890.

JOHN B. PEASLEE,
Clerk of the Common Pleas Court of Hamilton Co., O.
By R. H. BECHT, *Deputy.*

299 Hamilton County Court of Common Pleas.

WILLIAM J. COPPOCK, Adm'r of the Estate of Chas. A. Kebler, Deceased, Plaintiff, *vs.* JOHN KEBLER *et al.*, Defendants. } Answer of F. G. Roelker.

Now comes the defendant Frederick G. Roelker and for answer says that he admits that the said Wm. J. Coppock is the duly appointed and qualified administrator of the estate of Charles A. Kebler, late of Hamilton county, Ohio. This defendant further says that at and before the 23rd day of June, A. D. 1887, the said Chas. A. Kebler and this defendant were partners as attorneys-at-law, in the city of Cincinnati, Hamilton county, Ohio, and this defendant, further answering, says that on the 23rd day of June, A. D. 1887, the said Charles A. Kebler was indebted to this defendant in the sum of $10,100 upon a certain promissory note, a copy of which is as follows:

$10,100. CINCINNATI, *June 11th*, 1887.

One d*ate* after date I promise to pay to the order of F. G. Roelker ten thousand and one hundred dollars; value received.

(Signed) C. A. KEBLER.

300 And in the further sum of $3,000 upon a promissory note, a copy of which is as follows:

$3,000. CINCINNATI, O., *February 1st*, 1887.

On demand after date I promise to pay F. G. Roelker or order three thousand dollars for value received, payable at German National bank, with interest at six per cent. per annum, and I hereby pledge as collateral security for the payment of this note ten first-mortgage bonds, @ $1,000, of the Cincinnati, Georgetown and Portsmouth Railway Company.

(Signed) C. A. KEBLER.

That interest has been paid thereon to May 1st, 1887; and this defendant further says that on the 23rd day of June, A. D. 1887, the said C. A. Kebler was indebted to this defendant in the further sum of $600.00 for money theretofore loaned by this defendant to the said Charles A. Kebler and represented by the check of said Chas. A. Kebler drawn to the order of this defendant and held by this defendant. This defendant further says that on the said 23rd day of June, A. D. 1887, the said Charles A. Kebler executed and delivered to this defendant an assignment and transfer of the property therein secured, which agreement was in the words and figures following, to wit:

CINCINNATI, *June 23rd*, 1887.

For value received I hereby sell, assign, and transfer to Frederick G. Roelker all my right, title, and interest in and to the bonds of the Cincinnati, Georgetown and Portsmouth Railroad Company,

being a one-tenth interest therein; all my right, title, and interest in and to the bonds of said railroad, part of which are hypothecated, with other securities, for the payment of my obligations, it being understood that all other securities belonging to me pledged for the same debts as any bonds are are to be sold first and no bonds until they are exhausted.

Witness my hand this June 23rd, 1887.

CHAS. A. KEBLER.

And this defendant further says that upon the same day, to wit, June 23rd, A. D. 1887, and as a part of the same transaction the said Charles A. Kebler executed to this defendant his certain warranty deed, whereby he conveyed to this defendant all that certain lot of ground in the city of Cincinnati, Hamilton county, Ohio, being parts of lots No-. 17 & 18 in Christian Donaldson's revised plat of Vernon village as recorded in Deed Book 101, page 475, Hamilton county records, in the S. W. quarter of section 8, township 3, fractional range —, in the Miami purchase, bounded as follows: Beginning at a point in the west line of the Cincinnati and Lebanon turnpike at the north line of lot No. 17 in said subdivision, thence west on the north line of said lot No. 17 244.37 feet, more or less, to a point 50 feet east of the northwest corner of said lot No. 17; thence south parallel with the west line of lot- No-. 17 & 18 200 feet to the south line of lot No. 18; thence east on the south line of lot No. 18 50 feet; thence north parallel with the west line of lots 17 & 18 104 feet; thence east parallel with the south line of lot 17 190.74 feet, more or less, to the west line of the Cincinnati and Lebanon turnpike; thence north along the said west line of said turnpike 96.07 feet to the place of beginning, being a part of the property described in the petition of the plaintiff, Wm. J. Coppock, as adm'r of the estate of Charles A. Kebler, deceased; this defendant further says that of the bonds mentioned in said agreement of June 23rd, 1887, of The Cincinnati, Georgetown and Portsmouth Railroad Co. twelve of said bonds were the same bonds mentioned by the plaintiff in his petition in this case No. 79902 in this court as No. XII in the list of securities in said petition mentioned, said bonds being for $1,000.00 each and secured by mortgage on said railroad; this defendant further says that ten of the bonds mentioned in said writing of June 23rd, A. D. 1887, were the bonds of the said The Cincinnati, Georgetown and Portsmouth Railroad Company, of one thousand dollars each, mentioned in said promissory note for three thousand dollars, dated February 1st, 1887, and were on the 23rd day of June, 1887, in the possession of this defendant as collateral security for the said indebtedness represented by said note of $3,000; this defendant further says that the said assignment and transfer dated June 23rd, A. D. 1887, as well as the said warranty deed of the premises hereinbefore described, executed, and delivered to this defendant at the same time, to wit, on the 23rd day of June, 1887, were in fact executed and delivered to this defendant to secure the payment to this defendant by the said Chas. A. Kebler of the afore-

said indebtedness of said Charles A. Kebler to this defendant in addition to the sum of $3,000 represented by said note of Febr'y 1st, 1887, and to secure the payment to this defendant by the said Chas. A. Kebler of any indebtedness which upon a settlement of the accounts and business of the said partnership of Chas. A. Kebler
303 with this defendant might be found due to this defendant from the said Charles A. Kebler and to indemnify this defendant against any loss that he might sustain or liability that he might be under by reason of the business of said partnership; this defendant further says that the indebtedness hereinbefore set forth of the said Chas. A. Kebler to this defendant remained wholly unpaid and unsatisfied, save and except the sum of $1,825.00, which was paid to this defendant upon the said note dated June 11th, 1887, and is endorsed upon the back thereof on June 17th, 1887; and this defendant further says that Ferdinand Jelke and Herman L. Besuden, John F. Jelke and J. Hamden Robb and Robert F. Strong, as trustees, Mary Russell, Elizabeth Sampson claim to have had dealings with the said Charles A. Kebler, acting and professing to act as a partner of this defendant, whereby the said parties claim that the said partnership and this defendant became indebted to them and each of them; and this defendant says that he does not know and is unable to state the particulars of said transactions; that they were, and each of them, concealed from this defendant by the said Chas. A. Kebler, in his lifetime, and this defendant had no knowledge thereof until the death of the said Charles A. Kebler; and this defendant says that if there is any liability of the said partnership in the practice of the law and of this defendant by reason of his being a member of said partnership to the said parties above named, or to either of them, that said liability of this defendant is covered and this defendant is thereby indemnified against the same by the said assignment and transfer of said bonds and the conveyance of said real estate
304 on the 23rd day of June, A. D. 1887, as hereinbefore set forth, and this defendant says that the said Ferdinand Jelke, Herman L. Besuden, John F. Jelke, J. Hemden Robb, and Robert F. Strong, as trustees, and Mary Russell, Elizabeth Sampson are necessary parties to the determination of the right of plaintiff and of this defendant in the subject-matter of the litigation in this cause, and this defendant prays that they may be made defendants herein and required to answer and set up their claim, if any they have, against this defendant by reason of any transaction with the said Chas. A. Kebler, acting or professing to act as a partner of this defendant, and this defendant prays that upon a sale of the property described in the plaintiff's petition, in which it may be found that said Chas. A. Kebler had any interest as owner or otherwise, that the right of this defendant may be protected by the court and the distribution of the proceeds of said sale and for all other and proper relief.

KITTR-DGE & WILBY,
For F. G. Roelker.

STATE OF OHIO, }
Hamilton County, } ss:

Frederick G. Roelker, on oath, says that the allegations in the above answer contained are true as he verily believes.

FREDERICK G. ROELKER.

Sworn to before me and in my presence subscribed this 31st day of January, A. D. 1888.

[SEAL.] G. C. HOLLOWAY,
Notary Public, Ham. Co., O.

305 STATE OF OHIO, }
Hamilton County, } ss:

Common Pleas Court.

I, John B. Peaslee, clerk of the court of common pleas within and for the county and State aforesaid, do hereby certify the within and foregoing to be a true and correct copy of the answer of F. G. Roelker, filed Feb'y 4th, 1888, as recorded in vol. 53, page 399, of the records of the court of common pleas as appears of record in my office in the case No. 79812, wherein William J. Coppock, adm'r, &c., was plaintiff and John Kebler *et al.* were defendants, as appears from the files and records now in my office.

Seal Common Pleas Court of the County of Hamilton, Ohio.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Cincinnati, this 19th day of September, A. D. 1890.

JOHN B. PEASLEE,
Clerk of the Common Pleas Court of Hamilton Co., O.,
By R. H. BECHT, *Deputy.*

306 Court of Common Pleas of Hamilton County, Term of April, A. D. 1888.

WILLIAM J. COPPOCK, &c., }
vs.
JOHN KEBLER *et al.* }

On motion of the defendants, J. Hampden Robb and Charles E. Strong, and for good cause shown, it is ordered that this case and case numbered 79902 in this court be, and they are hereby, consolidated, and that all further proceedings in said consolidated action be had in and under the number of case 79902 aforesaid.

STATE OF OHIO, }
Hamilton County, } ss:

I, John B. Peaslee, clerk of the court of common pleas within and for Hamilton county, do hereby certify that the foregoing is a true and correct copy of an order made by the said court on the 21st day of April, 1888, Min., 185.

Seal Common Pleas Court of the County of Hamilton, Ohio.

Witness my hand and the seal of said court, at Cincinnati, this 17th day of September, A. D. 1890.
JOHN B. PEASLEE, *Clerk*,
By R. H. BECHT, *Deputy*.

[Endorsed:] No. 79812. Court of common pleas of Hamilton county. William J. Coppock, &c., plaintiff, *vs.* John Kebler *et al.*, defendants. Certified copy of entry consolidating with case No. 79902.

307 Court of Common Pleas of Hamilton County, Term of April, A. D. 1888.

W. J. COPPOCK, Adm'r,
vs.
SAMUEL KUHN *et al.*

And now, by leave of court, J. Hampden Robb and Charles E. Strong, as trustees, come now and withdraw the answer and cross-petition heretofore filed in these cases, and it is ordered that said answer and cross-petition be, and the same is hereby, withdrawn at the cost of the said Robb and Strong.

STATE OF OHIO, *Hamilton County*, } *ss:*

I, John B. Peaslee, clerk of the court of common pleas within and for Hamilton county, do hereby certify that the foregoing is a true and correct copy of an order made by the said court on the 17th day of May, 1888, Min., 275.

Seal Common Pleas Court of the County of Hamilton, Ohio.

Witness my hand and the seal of said court, at Cincinnati, this 17th day of September, A. D. 1890.
JOHN B. PEASLEE, *Clerk*,
By R. H. BECHT, *Deputy*.

[Endorsed:] No. 79902. Court of common pleas of Hamilton county. W. J. Coppock, adm'r, plaintiff, *vs.* Samuel Kuhn *et al.*, defendants. Certified copy of entry allowing withdrawal of answer and cross-petition of Robb & Strong.

308 Court of Common Pleas of Hamilton County, Ohio.

W. J. COPPOCK, Adm'r,
vs.
JOHN KEBLER *et al.* } Demurrer.

And now comes J. Hampden Robb & Charles E. Strong, made defendants in the above consolidated cases to the answer and cross-petition of Frederick G. Roelker therein filed, and demurs thereto on the ground that they are not proper parties to this case.

[Endorsed:] #79902. Ham. Co. com. pleas court. Wm. J. Coppock, adm'r, *vs.* John Kebler *et al.* Demurrer. Filed May 17th, 1888. D. J. Dalton, clerk.

309 STATE OF OHIO, *Hamilton County,* } *ss:*

Common Pleas Court.

I, John B. Peaslee, clerk of the court of common pleas within and for the county and State aforesaid, do hereby certify the within and foregoing to be a true and correct copy of the demurrer filed by J. Hampden Robb and Charles E. Strong on May 17th, 1888, as recorded in vol. 1, page 267, of the circuit court records in the case No. 79902, wherein Wm. J. Coppock, adm'r, was plaintiff and John Kebler *et al.* were defendants, as appears from the files and records now in my office.

Seal Common Pleas Court of the County of Hamilton, Ohio.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Cincinnati, this 17th day of September, A. D. 1890.

JOHN B. PEASLEE,
Clerk of the Common Pleas Court of Hamilton Co., O.,
By R. H. BECHT, *Deputy.*

310 Court of Common Pleas of Hamilton County, Term of April, A. D. 1888.

W. J. COPPOCK, Adm'r,
vs.
JOHN KEBLER *et al.*

This day this cause came on to be heard upon the demurrer of the defendants J. Hampden Robb and Charles E. Strong to the answer and cross-petition of Frederick G. Roelker; the court, on consideration whereof, sustains the same; to all of which the plaintiff excepts and said J. Hampden Robb and Charles E. Strong are dismissed with their costs.

STATE OF OHIO, *Hamilton County,* } *ss:*

I, John B. Peaslee, clerk of the court of common pleas within and for Hamilton county, do hereby certify that the foregoing is a true and correct copy of an order made by the said court on the 26 day of May, 1888, Min., 324.

Witness my hand and the seal of said court, at Cincinnati, this 17th day of September, A. D. 1890.

[Seal Common Pleas Court of the County of Hamilton, Ohio,]

JOHN B. PEASLEE, *Clerk,*
By R. H. BECHT, *Deputy.*

[Endorsed:] No. 79902, 79812. Court of common pleas of Hamilton county. W. J. Coppock, adm'r, plaintiff, *vs.* John Kebler *et al.*, defendant-. Certified copy of entry sustaining demurrer of Robb and Strong & dismissing them with their costs.

311 Court of Common Pleas of Hamilton County, Term of July, A. D. 1888.

WILLIAM J. COPPOCK, Administrator of the Estate of Charles A. Kebler, Deceased,
vs.
SAMUEL KUHN, LOUIS KUHN, SIMON KUHN, and Charles Kuhn, Partners as S. Kuhn and Sons; Horatio Wood, Antioch College, a Corporation under the Laws of Ohio; Henrietta D. Leonard, Mary C. Throop, Frederick G. Roelker, Adolph Hartdegen, Julia Fisher, Annie T. Morrison, Julius W. Nichols, May S. Russell, Martha C. Walker, George Thayer, Francis M. A. Curtis, Johanna Hamann, Margaret Cromwell, Lucy E. A. Kebler, Lucy D. Peters, and Lucy E. A. Kebler, Executrix of John Kebler, Deceased. } No. 79902.

It appearing to the court that all of the defendants above named have been duly served with summons or entered their appearance herein except the following—

And thereupon this cause coming on to be heard as to all the parties who have been served with summons or who have entered their appearances herein and upon the pleadings and evidence in the case the court finds that said William J. Coppock was appointed administrator of the estate of Charles A. Kebler, deceased, as stated in the petition, and is acting as such.

312 The court further finds that in order to determine the rights of the said plaintiff and other parties in the securities and properties mentioned in their petition it is necessary to decide as to the rights of the several parties therein. The court does further find—

1st. That there is justly due and owing to the said S. Kuhn & Sons from the estate of Charles A. Kebler the sum of $5,301.10, with interest from April 2nd, 1888, and that the same is secured by a lien on a number of the securities mentioned in the petition which were pledged for the payment of the same.

2nd. And the court finds that the said plaintiff, as administrator as aforesaid, should pay for and discharge the said claim of said S. Kuhn and Sons. The court does therefor- order the said administrator to pay to the said S. Kuhn & Sons the said sum so found due as aforesaid within five days from the entry hereof, and does further order and adjudge that the said administrator shal- be subrogated to the rights of said S. Kuhn & Sons in said securities upon payment to said S. Kuhn & Sons of their said claim, and that the rights of none of the other claimants and lienholders herein shall

be prejudiced by said subrogation, and upon such payment to S. Kuhn & Sons by said Wm. J. Coppock, adm'r, said S. Kuhn and Sons are ordered to transfer and -eliver to said Wm. J. Coppock, as such adm'r, all of the said bonds, papers, and securities as described in the three promissory notes mentioned in the answer and cross-petition of S. Kuhn and Sons, which bonds, papers, and securities shall be held and dealt with by said administrator as herein-
313 inafter ordered and as may hereafter be ordered.

3rd. The court does further find that Margaret Cromwell is entitled to and is the owner of a certain promissory note dated October 16th, 1882, and made by Ed. H. Maxwell and Louisa Ludlow Maxwell to the order of John Kebler for $1,500, payable in two years after date, with interest thereon at the rate of 7 per cent. per annum, and of a mortgage made to said Kebler upon certain lands in Ludlow, Kenton Co., Kentucky, securing said note, and which was left for record in the Covington, Ky., office of said Kenton Co. on October 18th, 1882, and recorded in Book 23 of the mortgage records of the said county on page 482, and that none of the other parties to this suit have any interest therein. It is further ordered, adjudged, and decreed that the said S. Kuhn & Sons or said William J. Coppock, adm'r, shall deliver said note and mortgage to the said Margar*te* Cromwell or her attorneys, McClintick & Strong.

4th. The court does further find that Horatio Wood, one of the defendants, is the owner of a certain note made by Lee Kahn for $4,000.00, dated November 4th, 1870, said note being made payable in one year after date, with interest at 8 per cent., and is also the owner of a mortgage securing said note, and which is duly recorded in Book 317, page 85, of the records of Hamilton county, Ohio; and the court finds that none of the other parties to this suit have any interest in this note and mortgage. The court does further order S. Kuhn & Sons or said William J. Coppock, adm'r as aforesaid, to deliver over to the said Horatio Wood or his attorneys, W-lby & Wald, the said note and mortgage.

314 5th. The court does further find that Lucy D. Peters is the owner of the 45 shares of the certified stock of the Cincinnati Railroad, Omnibus Line and Baggage Express Company set out in her answer and cross-petition in this case, and that she is entitled to have the same delivered to her. The court further find that none of the other parties in this case have any interest in the said stock. It is further ordered, adjudged, and decreed that the said William J. Coppock, adm'r, deliver over to the said Lucy D. Peters or her attorneys the said 45 shares of stock as aforesaid.

6th. The court does further find that Julie W. Nichols, Annie T. Morrison, and Mary C. Throop are owners of the note of $2,500.00 mentioned in the petition made to John M. Strobel and wife for $2,500.00, dated September 11th, 1878, and payable in three years after date, with 8% *per cent.* interest, and that they are also entitled to a mortgage mentioned in the pleadings in this case securing said note, and which mortgage is recorded in Book 416, page 338. The court further finds that $1,000.00 was paid on said note to said S. Kuhn

& Sons on the — day of —— upon account of the indebtedness owing by the said Charles A. Kebler to said Kuhn & Sons, but that as against the other parties to this suit the said Julia W. Nichols, Annie T. Morrison, and Mary C. Throop are entitled to the whole of the said note and mortgage of $2,500.00, and that said Kuhn & Sons are entitled and bound to repay said sum of $1,000.00, but are entitled themselves to be repaid the same out of the other securities which they hold, except those to which said Margaret Cromwell
315 and Horatio Wood are entitled, and which makes up, with the other indebtedness owing to them as above stated, the total sum of $5,301.10. It is further ordered, adjudged, and decreed that the said William J. Coppock, adm'r as aforesaid, shall deliver said note and mortgage to the said Julia W. Nichols, Annie T. Morrison, and Mary S. Throop, and also to pay them the sum *the sum* of $1,000.00. The court finds that none of the other parties to this suit have any interest in this said note and mortgage.

7th. The court further finds that Johanna Hamann is the owner of and entitled to the following notes and securities mentioned and set out in the petition, her answer and cross-petition, and the pleadings in this case: A certain note made by J. J. Farrell for $800, dated May 14th, 1883, and payable in five years after date, with interest at 6%, and also of a certain mortgage securing said note, which is recorded in Book 462, page 165; also a certain note and mortgage made by William C. Elstner for $500, dated April 16th, 1873, and payable in two years after date, being the same note mentioned in the 7th paragraph of plaintiff's petition, and that she is also the owner of a certain mortgage securing said note, recorded in Book —, page —, of the records of Hamilton county, Ohio; that she is also entitled to a certain note made March 14th, 1878, for $425 by Charles E. Elstner and payable in one year after date, with 8% interest, and being the same note described in the 8th paragraph of the petition.

The court doth further find that Johanna Hamann is en-
316 titled to a certain promissory note described in the 10th paragraph in the petition made by Thos. L. Brown for $4,108.10, dated March 18th, 1887, and payable — years after date, with 6% interest per annum, and is also the owner of a certain mortgage securing said note, recorded in Book 534, page 263, of the records of Hamilton county, Ohio. The court also finds that she is entitled to that certain promissory note mentioned in the 3rd paragraph in the petition, made by F. & C. Burckle for $800, dated November 24, 1882, and payable in two years after date, with interest at 7%, and that she is also the owner of a certain note and mortgage securing said note, recorded in Book 454, page 403.

It is further ordered, adjudged, and decreed that the said plaintiff pay to the said Johanna Hamann or Thos. McDougall, her attorney, the said note and mortgage made by J. J. Farrell, the said note and mortgage made by William C. Elstner, the said note made by the said Charles E. Elstner, the said note and m-rtgage made by Thos. L. Brown, and the said note and mortgage made by the said

F. & C. Burckle, and the court finds that none of the other parties in this case have any interest in the same.

8th. The court further finds that Lydia Potter is entitled to the note set out in her cross-petition, made by John F. Burckle for $800, dated November 3rd, 1884, and payable in three years after date, with interest from date at 7% per annum; also an interest note thereon of $28.00 of same date, made by said Buerckle, if the same has not been paid; also a certain mortgage securing said notes, recorded in Mortgage Book, *page* 488, page 415, of the mortgage records of Hamilton county, Ohio, and being the same notes
317 and mortgage set forth and described in paragraph 4 of plaintiff's petition.

The court further finds that none of the other parties to this suit — any lien thereon or interest therein.

It is therefore ordered and adjudged that said William J. Coppock, adm'r as aforesaid, be, and he is hereby, ordered to pay over said notes and mortgage to the said Lydia Potter or her attorneys.

9th. The court does further find that Charles A. Kebler in his lifetime, on or about the 21st day of April, 1886, executed a deed purporting to convey to Frederick C. Roelker in fee simple his one undivided half interest in certain real estate on Oak street, described as follows: "The following-described real estate, situated in the city of Cincinnati, county of Hamilton and State of Ohio, in section fourteen (14), township (3) three, fractional range two (2), of the Miami purchase, beginning at the southwest corner of Bellevue avenue and Oak street, thence west along the south line of Oak street four hundred and six (406) —, more or less, to the corner of Eden avenue; thence south with the east line of Eden avenue one hundred and sixty-eight (168) feet, more or less, to the north line of the subdivision made by the city of Cincinnati; thence east along said north line and parallel with Oak street four hundred and six (406) feet, more or less, to the west line of Bellevue avenue; thence north with the west line of Bellevue avenue one hundred and sixty-eight feet, more or less, to the place of beginning, reference being had to the plat of subdivision made by William Burnet, and recorded in Book 112, page 621, of Hamilton county records; also
318 the following real estate, situated in Cincinnati, Hamilton county and State of Ohio, and described as follows: Lots numbers sixty-seven (67) and sixty-eight (68), in city of Cincinnati, subdivision of 'Burnet work-house lot,' as shown and recorded in Plat Book Five (5), page ten (10), Hamilton county records, and being the same premises conveyed to the grantor and grantee herein by Truman B. Handy, it being the intention of this deed to convey to the grantee herein the undivided one-half conveyed to said Charles A. Kebler by said Truman B. Handy, excepting, however, therefrom a lot in said tract sold to Mary Eckelmann by said Roelker & Kebler, and also the property fronting on Bellevue avenue sold to Kazall by the said Roelker & Kebler," said deed being recorded in Deed Book 641, page 351, of the records of Hamilton county, Ohio; which said deed the court does find to be in fact and in law a mortgage given to secure the payment to F. G. and Henry

G. Roelker, executors, the sum of $3,335.00, with 7 % interest per annum from the 9th day of June, 1886, payable annually, due to said executors upon the certain promissory note for the sum made by John Kebler, bearing date June 9th, 1884, and payable to said executors; and the court finds that said Frederick G. Roelker is entitled to hold said mortgage for the payment of the said amount due on said note; and the court finds that none of the other parties to this action have any interest in said deed of mortgage.

10th. And the court further finds that there is justly due and owing from the estate of Charles A. Kebler to Henreitta D. Leonard the sum of $9,100.00, with interest from November 23rd, 1887.

319 The court further finds that since the death of said Charles A. Kebler and the appointment of said administrator said Henreitta D. Leonard has replevied from the said administrator chattel property under a bill of sale held by her, and that the said chattels were of the value of $1,200, and that she has agreed to credit the same on her said lien. It is therefore ordered by the court that the said amount of $1,200.00 be applied and deducted from her said claim, and the balance after deducting the same is $—.

11th. And the court further finds that there is justly due and owing from the estate of Charles A. Kebler to Adolph Hartdegen the sum of $3,800.00, with interest from August 22nd, 1887.

12th. And the court further finds that there is justly due and owing from the estate of Charles A. Kebler to Mrs. Mary S. Russell the sum of $3,517.00, with interest from the — day of ——, 188–.

13th. The court further finds that Charles A. Kebler in his lifetime, on or about the — day of ——, 188–, executed a promissory note for the sum of $10,000, and also executed a mortgage to secure said note on his undivided half interest in certain real estate on Oak street, described as follows:

And which mortgage is recorded in Mortgage Book —, page —, of said records, and that S. Kuhn & Sons have the first and best lien on said note and mortgage for the amount of their said claim as above found, to wit, $—, and that after the payment of the said sum, with interest, out of said $10,000.00 note and mortgage the said Henreitta D. Leonard is entitled to the balance of the

320 money that may be realized out of said note and mortgage, the same to be applied in part payment of the said sum as found due her as aforesaid.

And if, after the payment of the said claim of Henrietta D. Leonard, there be any balance, then said Adolph Hartdegen is entitled to the same, to be applied as a credit upon the sum so found due him as aforesaid. If, after the payment of the said claim of Adolph Hartdegen, there be any balance, then the said Mary S. Russell is entitled to the same, to be applied as a credit upon the sum so found due her as aforesaid. If there be any balance the same to go to Wm. J. Coppock, adm'r as aforesaid.

14th. And the court further finds that there is justly due and owing from the estate of Charles A. Kebler to Frederick G. Roelker the following sums, viz:

1. The sum of $3,000, with interest from May 1st, 1887, upon said Charles A. Kebler's certain promissory note of that date, payable to the order of said F. G. Roelker, and described in his answer and cross-petition herein.

2. The sum of $600, with interest from June 23rd, 1887, upon said Charles A. Kebler's certain check on S. Kuhn & Sons of that date, payable to the order of said F. G. Roelker, and set forth in his answer and cross-petition in this action.

3. The balance of $8,285.10, with interest from June 17th, 1887, upon Charles A. Kebler's certain promissory note for the sum of $10,000, bearing date June 11th, 1887, and payable to the order of F. G. Roelker, and set forth in his answer and cross-petition in this action.

4. The sum, not exceeding $3,000, due in settlement of partnership accounts.

321 15th. The court does further find that Charles A. Kebler in his lifetime — or about June 23rd, 1887, executed a deed, which is recorded in B*b*ok 642, page 302, of said records, purporting to convey to said F. G. Roelker in fee simple the following-described real estate, "in the city of Cincinnati, county of Hamilton and State of Ohio, being parts of lots numbered seventeen (17) and eighteen (18), in Christian Donaldson's revised plat of Vernon village, as recorded in Deed Book 101, page 475, Hamilton county, Ohio, records, and in southwest quarter of section eight, township three, fractional range two, in the Miami purchase, bounded as follows: Beginning at a point in the west line of the Cincinnati and Lebanon turnpike at the north line of lot 17, in said subdivision, thence west on the north line of said lot number 17 two hundred and forty-four $\frac{37}{100}$ feet, more or less, to a point fifty feet east of the northwest corner of said lot No. 17; thence south parallel with the west line of lots No. 17 & 18 two hundred feet to the south line of lot No. 18; thence east on the south line of lot No. 18 fifty feet; thence north parallel with the west line of lots 17 & 18 one hundred and four feet, more or less; thence east parallel with the south line of lot No. 17 one hundred and ninety $\frac{74}{100}$ feet, more or less, to the west line of the Cincinnati & Lebanon turnpike; thence north along said west line of said turnpike ninety-six $\frac{7}{100}$ (97.07 (feet to the place of beginning, being the same premises conveyed to Florence L. Kebler by Joseph W. Wilshire and Ada V. H. Wilshire, his wife, by deed recorded in Deed Book 574, page 348, Hamilton
322 county, Ohio, records, and by J. E. Murdock *et al.* by deed recorded in Deed Book 601, page 185, of said records;" which said deed the court finds to be in fact and in law a mortgage upon said real estate given to the said F. G. Roelker to secure the payment to him of the four separate sums so as aforesaid found due him; and the court orders that whatever amount that may be realized upon said mortgage be applied as a credit upon the said four sums so as aforesaid found due said F. G. Roelker.

16th. And the court does further find that at the time of his death said Charles A. Kebler was the owner of twenty-five (25) bonds of the par value of $1,000 each of the Cincinnati, Georgetown

and Portsmouth Railroad Company, thirteen of which bonds being at the time deposited with S. Kuhn & Sons, ten of same being in the hands of F. G. Roelker, and two being in the hands of H. G. Roelker; and the court further finds that said S. Kuhn & Sons have the first and best — upon said thirteen of said bonds so as aforesaid for the payment of said sum of $—— as aforesaid found due to them in the event of not enough being realized out of said $10,000 note and mortgage to pay the same; and the court finds that after the payment of said sum of $—— to S. Kuhn & Sons as aforesaid provided said Frederick G. Roelker has the next best lien on said thirteen bonds so as aforesaid in the hands of S. Kuhn & Sons and the first and best liens upon the other twelve bonds by virtue of an assignment of all of said bonds executed and delivered by said Charles A. Kebler to said F. G. Roelker dated June 23rd, 1887, and part of the same transaction with the said conveyance of real
323 estate by deed dated June 23rd, 1887, and recorded in Book 642, page 302, as set forth in the answer and cross-petition of said F. G. Roelker for the payment of any balance that may be found due to him after crediting as aforesaid ordered whatever may be realized for him out of said mortgage deed recorded in said Deed Book 642, page 302, of the records aforesaid.

The court further finds that after the payment of the said sum to said F. G. Roelker said Henreitta D. Leonard has the next best lien upon all of said 25 bonds for the payment to her of whatever balance may be due to her on the said sum of $9,100 and interest so as aforesaid found due to her after making the credits on the same aforesaid provided for. And the court further finds that after the payment in full of the claim of said Henreitta D. Leonard the said Adolph Hartdegen has the next best lien upon all of said 25 bonds for the payment to him of said $3,800 and interest so as aforesaid found due him.

And the court further finds that after the payment in full of the said claim of said Adolph Hartdegen said Mary S. Russell has the next best lien on all of said 25 bonds for the payment to her of said $3,517 and interest so as aforesaid found due her.

Whatever balance there may be after the payment of the said claim the court finds should go to said Wm. J. Coppock, administrator of the estate of Charles A. Kebler.

17th. And the court further finds that said Henreitta D. Leonard is entitled to hold as security for the said claim of $9,100 and interest the promissory note of Wm. S. Ricks and wife for $200.00
324 mentioned in her answer and cross-petition and the note of Carl A. G. Adae for $500.00. After the payment of said claim of Henreitta L. Leonard said Adolph Hartdegen is entitled to hold said two notes as security for the $3,800 and interest so as aforesaid found due to him. And after the payment in full of the amount found due him of said Adolph Hartdegen said Mary S. Russell is entitled to hold said two notes as security for the said sum of $3,517 and interest so as aforesaid found due her. The court further finds that none of the other parties to this suit have any interest in said two notes except Wm. J. Coppock, who, as administrator as afore-

said, is entitled to the same after the payment of the said claims of Henreitta D. Leonard, Adolph Hartdegen, and Mary S. Russell.

The court orders that said William J. Coppock, administrator as aforesaid, shall proceed to sell and dispose of said note and mortgage of $10,000 described in the 13th paragraph of this decree, or that he proceed to foreclose said mortgage and collect the amount due thereon as speedily as possible, and pay ove- the proceeds thereof in the manner and according to the findings of this decree.

The court further finds that the real estate mentioned in the 15th paragraph of this decree has been sold, and that after paying all prior liens and charges on said real estate and the costs connected with said sale, the*ir* remains in the hands of the said administrator the sum of $— applicable for the purposes stated in said paragraph, and the said administrator is ordered to pay the same to the said F. G. Roelker.

325 The court further orders that the said bonds of the said Georgetown, Portsmouth Railroad Company mentioned in the 16th paragraph of thi*d* decree be sold by said administrator and the proceeds applied to the findings and provisions of this decree.

The court further finds that the said administrator proceed to collect the note of said William S. Ricks and Carl A. G. Adae, and that *the* apply the proceeds of the same according to the findings of this decree.

To all of which the plaintiff Wm. J. Coppock, administrator, excepts, and gives notice of appeal, and prays that the same be allowed without bond, which is accordingly done, it appearing to the court that said Wm. J. Coppock, as administrator of C. A. Kebler, deceased, has given bond in this State, with sureties, according to law.

And also came Fred'k G. Roelker, one of the defendants, by counsel, and excepts to the foregoing decree, and gives notice of appeal, and prays that the same be allowed, which is accordingly done, and the appeal bond fixed at the sum of $300.00, which is also fixed by the court as the amount of appeal bond for each and every appeal taken by any of the parties herein.

And also came and severally excepted *the* to the foregoing decree, S. Kuhn & Sons, Margaret Cromwell, Johanna Hamann, Antioch College, of Yellow Springs, Ohio, Lydia Potter, and Horatio Wood, by their respective counsels, and severally gave notice of appeal from this decree and prayed and were allowed appeals, with bond fixed at $300.00 for each appeal, as aforesaid.

326 STATE OF OHIO, }
Hamilton County, } *ss:*

I, John B. Peaslee, clerk of the court of common pleas, within and for Hamilton county, do hereby certify that the foregoing is a true and correct copy of an order made by the said court on the 1st day of August, 1888, min. 1042.

Witness my hand and the seal of said court, at Cincinnati, this 30th day of September, A. D. 1890.

[Seal Common Pleas Court of the County of Hamilton, Ohio.]

JOHN B. PEASLEE, *Clerk*,
By R. H. BECHT, *Deputy*.

[Endorsed:] No. 79902. Court of common pleas of Hamilton county. Wm. J. Coppock, adm'r, &c., plaintiff, *vs.* Samuel Kuhn *et al.*, defendants. Certified copy of decree.

327 And afterwards, to wit, on the 26th day of November, A. D. 1889, the following entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry. Journal Y, p. 492.

This day came the parties, by their solicitors, and thereupon this cause came on to be heard upon the pleadings and the evidence, and was argued by counsel; on consideration whereof the court do find that the equity of the case is with the defendants, and that all the things and acts done by Charles A. Kebler and by the firm of Kebler & Roelker and by the firm of Kebler, Roelker & Jelke, complained of in the bill of complainants as having been done without the authority, knowledge, or consent of the complainants, were subsequently and prior to the filing of the bill herein fully adopted and ratified by said complainants.

It is therefore ordered, adjudged and decreed that the bill of the complainants do from henceforth stand absolutely dismissed out of this court, with costs to be taxed; and thereupon came the complainants and prayed an appeal to the Supreme Court of the United States, which appeal is allowed in open court upon complainants giving bond in the sum of $500 for costs.

The court do further find that at the time of the filing of said bill herein the defendant August Vos was in possession of the real estate firstly described in said bill, and had the legal
328 estate in and was entitled to the possession of the same; that neither the said complainants nor either of them have any estate in or are entitled to the possession of said real astate or any part thereof, and that the said August Vos ought to have his title and possession quieted as against each of said complainants, as prayed for in his cross-petition in case 4182, consolidated with this case.

It is therefore ordered, adjudged, and decreed that the title and possession of the said August Vos to the real estate firstly described in said bill of complainants be, and the same are hereby, quieted as against the said complainants and each of them and all persons claiming under them or either of them, and they are hereby forever enjoined from setting up any claim to said real estate or any part thereof adverse to the title and possession of the said August Vos, his heirs or assigns thereto, and that said complainants pay the costs in said case 4182.

And thereupon came the complainants and prayed an appeal to the Supreme Court of the United States from the foregoing decree, and said appeal is allowed upon complainants giving bond in the sum of $500 to cover costs.

329 And afterwards, to wit, on the 30th day of January, A. D. 1890, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

330 Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

JAMES HAMPDEN ROBB & CHAS. E. STRONG, Trustees,
vs.
AUGUST VOS, WM. MORITZ, & WM. STIX, Def'ts.

Know all men by these presents that we, James Hampden Robb & Charles E. Strong, trustees, as principals, & Richard Ryan, as surety, are held and firmly bound unto August Vos in the sum of five hundred dollars, to be paid to the said August Vos, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 30th day of January, 1890

Whereas the above-named James Hampden Robb and Charles E. Strong, trustees, have taken out an appeal to the Supreme Court of the United States of America to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such, that if the above-named James Hampden Robb & Charles E. Strong, trustees, shall prosecute their said appeal to effect and answer all costs, if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

RICHARD RYAN. [SEAL.]

Sealed and delivered in presence of—
F. M. COPPOCK.
ROB'T C. GEORGI.

The above security is approved.

GEO. K. SAGE,
District Judge of the United States, S. D. Ohio,
Sitting & Holding Circuit Court.

331 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Richard Ryan, one of the sureties above named, do solemly swear that after paying my just debts and liabilities I am worth

two thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

RICHARD RYAN.

Sworn to before me the 30th day of January, 1890.

[SEAL.] ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O.

And afterwards, to wit, on the 30th day of January, A. D. 1890, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

332 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Richard Ryan, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.

RICHARD RYAN.

Sworn to before me the 30th day of January, 1890.

[SEAL.] ROB'T C. GEORGI,
Dep. Clerk U. S. Circuit Court, S. D. O.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

JAMES HAMPDEN ROBB & CHAS. E. STRONG, Trustees, Compl'ts,
vs.
AUGUST VOS, WM. STIX, and MORITZ LOTH, Def'ts.

Know all men by these presents, that we, James Hampden Robb & Charles E. Strong, trustees, as principals, and Richard Ryan, as surety, are held and firmly bound unto August Vos, in the sum of five hundred dollars, to be paid to the said August Vos, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 30th day of January, 1890.

Whereas the above-named James Hampden Robb & Chas. E. Strong, trustees, have taken out an appeal to the Supreme Court of the United of America, to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named James Hampden Robb & Chas. E. Strong, trustees, shall prosecute their said appeal to effect and answer all costs

if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

RICHARD RYAN. [SEAL.]

Sealed and delivered in presence of—

F. M. COPPOCK.
ROB'T C. GEORGI.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. Ohio,
Sitting and Holding Circuit Court.

333 UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk U. S. circuit court within and for the district and division aforesaid, do hereby certify that the foregoing is a true, correct, and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in the clerk's office of said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, O., this 3d day of October, A. D. 1890.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk.*
By R. C. GEORGI, *Deputy.*

Endorsed on cover: Case No. 14,267. S. Ohio C. C. U. S. No. 252. James Hampden Robb and Charles E. Strong, trustees, appellants, *vs.* August Vos. Filed October 13, 1890.

(14,267.)

(14,267.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 252.

JAMES HAMPDEN ROBB AND CHARLES E. STRONG, TRUSTEES, APPELLANTS,

vs.

AUGUSTUS VOS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 6, 1894.

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a Supreme Court of the United States, October Term, 1893.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, Appellants,
vs.
AUGUST VOS and WILLIAM STIX, Appellees.
} No. 252.

It is now stipulated by counsel for the appellant and for the appellees that the following papers may be deemed and taken as part of the record in this case and referred to as such, to wit:

Papers referred to as Exhibits "A," "B," "C," "D," "E," and "F" in the deposition of James Hampden Robb (p. 125 of the printed record), and the answer and cross-petition of James Hampden Robb and Charles E. Strong, trustees, in case No. 79812, court of common pleas, Hamilton county, Ohio, wherein William J. Coppock is plaintiff and Samuel Kuhn *et al.* are defendants, and also the petition in said case.

Also the transcript of papers and proceedings in case of Robb & Strong, trustees, *vs.* August Vos, No. 4182, U. S. circuit court,
b S. D. O., W. D., being case removed from the superior court of Cincinnati, No. 43368, and the proceedings after removal in said case 4182, being motion to remand and entry overruling same.

A. B. HUSTON,
Counsel for August Vos.
GUSTAVUS H. WALD,
Counsel for William Stix.
EDWARD COLSTON,
Counsel for Appellants.

1 The United States Circuit Court, Southern District of Ohio, Western Division.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, Complainants,
vs.
AUGUST VOS *et al.*, Defendants.
} No. 4148.

Be it remembered that on the ninth day of May, in the year of our Lord one thousand eight hundred and eighty-nine, there was filed in the clerk's office of said court the deposition of James Hampden Robb and Exhibits A, B, C, D, E, & F, referred to in said deposition; which exhibits are clothed in the words and figures following, to wit:

2 PLAINTIFFS' EXHIBIT "A" TO DEPOSITIONS OF J. HAMPDEN ROBB.

For an amicable settlement of all claims and controversy as to the estate of James Robb, deceased, late of Hamilton county, Ohio, it is now mutually agreed by the undersigned as follows:

That Mrs. Wittenberger's claim for an annuity of one thousand dollars in accordance with her agreement with her father for her son's education from the time he became ten years of age until he became twenty-one years of age, which is now in suit No. 37317 in the superior court of Cincinnati, and James Hampden Robb's claim in suit No. 37820 in the same court, and Mrs. Ellen W. Robb's claim in suit No. 67460 in the court of common pleas of the said county of Hamilton are all hereby allowed by Charles A. Kebler, administrator, by and with the consent of the undersigned and at their request, as valid claims against said James Robb's estate and shall be satisfied and discharged in the manner hereinafter provided and agreed as to each of them respectively; the claim of Mary Robb in suit No. 67459, common pleas, to be also provided for and discharged as hereinafter agreed.

2. The deed which is alleged to have been made by the said James Robb on or about November 14th, 1879, to his daughter, Mrs. Isabella San Raman, conveying to her the tract of land near Cheviot, then owned and occupied by him, being without consideration and in consequence of his insolvency at that time wholly void as to his creditors, it is agreed by Charles A. Kebler, as administrator of said estate, that in pursuance of the statute in such case provided and by request of the other subscriber hereto he shall and will immediately bring an action for the recovery of the said land or for the sale of said land and avoidance of the said pretended conveyance for the benefit of said estate and its creditors.

3. Besides the outstanding debts for personal and household expenses of James Robb, the cost of the monument heretofore
3 agreed by the undersigned to be erected at Spring Grove cemetery in memory of the said James Robb and all the proper costs and expenses of the administration of his estate and of the suit for the recovery of the land above mentioned, including the administrator's counsel fees, shall first be paid out of the moneys now in his hands.

4. After paying the same the remaining moneys in his hands and the proceeds of the sale of the land aforesaid or so much as necessary shall be set apart and invested for two trust funds as follows: One of the said funds shall be made sufficient to pay Mrs. Wiltenberger the amount already due of said annuity, in compliance with the agreement made with her father for account of her son's education, and also to yield and pay the said annuity year by year until her son becomes twenty-one years of age, if he lives, and the surplus of said fund, if any remaining after he becomes of age or in case he dies before becoming of age, shall fall into the residuary estate to be divided as hereinafter agreed; the other of the said trust funds to be sufficient to secure and pay to Mrs. Ellen N. Robb an annuity of six hundred dollars ($600.00) for and during the term of her life, payable semi-annually, and to commence from the — day of ——, A. D. ——, and from and after her decease to pay the said Mary Robb, her daughter, if she survives her mother, an annuity of three hundred dollars ($300), payable semi-annually, for and during the term of the life of said Mary, and that the annuities so to be paid

to the said Mary R. Wittenberger, Ellen N. Robb, and Mary Robb, respectively, shall be in full satisfaction and discharge of all their claims aforesaid as creditors of the said estate.

The appointment of trustees and appropriation of funds necessary and sufficient for the two trusts aforesaid shall be effected as soon as practicable by the said Charles A. Kebler, the administra-
4 tor, and the partied concerned.

5. All the pictures, library, letters, and papers, plate and other chattels, useful or ornamental, belonging to the said estate shall be turned over to James Hampden Robb, reserving for Mrs. Charlotte M. Pancoast some one article to be agreed upon by them, which portions of the estate shall be received and taken by the said James Hampden Robb in full satisfaction and discharge of all his claim aforesaid as a creditor of the said estate.

6. The residue, if any, of the moneys now in the administrator's hands and which shall arise from the sale of the real estate aforesaid, after providing for said trusts, and also any residue which may be left of the trust funds so set apart, after fulfilling the said trusts respectively, shall be divided and paid in four equal shares to and among the children and heirs of the said James Robb, deceased, viz., James Hampden Robb, Mrs. Isabella San Raman, Mrs. Mary R. Mittenberger, and Mrs. Charlotte M. Pancoast.

It is understood that the foregoing agreement shall take effect immediately upon the order of the court for the sale of said real estate; and the setting aside the deed from James Robb to Isabella San Raman herein referred to and not before.

In witness whereof the said Charles A. Kebler, administrator of the said estate; Mary R. Mittenberger, Charlotte M. Pancoast, James Hampden Robb, Ellen M. Robb, and Mary Robb have hereunto set our hands and seals in five parts interchangeably this — day of June, in the year 1883.

CHARLES A. KEBLER, *Administrator.* [SEAL.]
MARY R. MITTENBERGER. [SEAL.]
CHARLOTTE M. PANCOAST. [SEAL.]
J. HAMPDEN ROBB. [SEAL.]
ELLEN W. ROBB. [SEAL.]
MARY ROBB. [SEAL.]

Witness:
J. E. DUFFY.
A. ANDERSON.
WM. H. PANCOAST.
CHAS. F. O'KIEFFE.

[Endorsed:] Pl'ffs' Ex. A. April 26, '89.

5 PL'T'FFS' EXHIBIT "B" TO DEPOSITION OF J. HAMPDEN ROBB.

THE STATE OF OHIO, }
Hamilton County, } ss:

To the sheriff of the county of Hamilton:

You are commanded to notify (R. 18) Moritz Loth and (p. 18) Fredericka Loth, his wife; Adolph Feiss (?), William Stix, the National Park Bank of New York, a corporation duly created under the laws of the United States (18 R.); Bernhard Bettmann (R. 20), Abraham J. Friedlander (19 p.), Ricka Amberg (18 p.), the First (this) National Bank of Cincinnati, a corporation duly created under the laws of the United States (18 p.); Elijah Newman, Otto Jaffe, and Frederick S. Pinkus, partners as O. Jaffe & Pinkus (p. 18); J. D. Hearne, (F. D. H., pres't, p. 18) the Third National Bank of Cincinnati, a corporation duly created under the laws of the United States, (C. B. Foot, pres't, p. 18) the Commercial Bank of Cincinnati, a corporation duly created under the laws of Ohio; James Hampden Robb and Charles E. Strong, trustees (p.); Henry W. Taylor, Bertha Mann, Fannie Mann (p. 18), Henry Adler, Louis Adler, Philip Stromberg (R., 20), Abraham Reeser (p. 19), August Vos, and George A. Clark, defendants, that they have been sued by Meyer Guggenheimer, pl't'f, in the court of common pleas of Hamilton county, and that unless they answer by the 12th day of December, A. D. 1885, the petition of the said plaintiff against them filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23*th* day of November, A. D. 1885.

Witness my hand and the seal of the said court, at Cincinnati, this 13th day of November, one thousand eight hundred and eighty-five.

DANIEL J. DALTON,
6 *Clerk of the Court of Common Pleas, Hamilton Co., O.,*
By W. H. SARGENT, *Deputy.* [SEAL.]

Service accepted by Henry W. Taylor.
PERRY & JENNEY, *Attorneys.*

We accept service of summons in the within cause for Charles E. Strong and James Hampden Robb, trustees, and for William Stix this November 19, 1885.

KEBLER & ROELKER,
Attorneys for Above-named Defendants, Duly Authorized Hereto.

1885, November 18th.—Served the within-named defendants, Moritz Loth — Bernard Bettmann, by leaving a true copy of this writ, with endorsements thereon, at each of their usual places of residence; and on same day served Fredericka Loth, Elijah Newman, J. D. Hearne, and Henry Adler by delivering to each of them

personally a true copy hereof, with endorsements thereon; and on same day served the First National Bank of Cincinnati by leaving a true copy hereof at the business office of said bank, in the hands of Theodore Stanwood, its cashier, there being no president, mayor, chairman, or president of the board of directors or trustees or other chief officer found; also served the Third National Bank of Cincinnati by leaving a true copy hereof, with endorsements thereon, at its business office, in the hands of J. D. Hearne, its president; also served the Commercial Bank of Cincinnati by leaving a true
7 copy hereof, with endorsements thereon, at its business office, in the hands of C. B. Foote, its president; and service accepted by Kebler & Roelker, attorneys for Charles E. Stone and James Hampden Robb, trustees, and for William Stix, as per acceptance above written, and on the 19th served Ricka Amberg and August Voss, by delivering to each of them personally a true copy hereof, with endorsements thereon, and on the 20th, Abraham J. Friedlander and Abraham Reeser, by leaving a copy hereof, with endorsements thereon, at each of their usual places of residence, and on the 23rd day of November, 1885, service accepted for Henry W. Taylor by Perry & Jenny, his attorneys; as to the other defendants within named "not found."

SAMUEL BERESFORD, *Sheriff*,
By JOS. E. HART, *Deputy*.

Fees—Sheriff.

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8 (Endorsed on back:) No. 74375. Hamilton common pleas. Meyer Guggenheimer, plaintiff, *vs.* Moritz Loth *et al.* defendants. Sommons in action for sale of real estate, &c., for receiver and general relief. Pl'ff Ex. B. Copied 26, '89. Filed Nov. 23, 1885. D. J. Dalton, clerk. To 23 day of Nov., 1885. Long, Avery, Kramer & Kramer, att'ys. Samuel Beresford. Rec'd Nov. 14, 1885. ——, sheriff.

9 PL'FFS' EXHIBIT "C" TO DEPOSITION OF J. HAMPDEN ROBB.

Cross-bill.

THE STATE OF OHIO, } ss:
Hamilton County, }

To the sheriff of the county of Hamilton:

You are commanded to notify J. D. Hearne, The Third National Bank of Cincannati, O., Moritz Loth, William Stix, Adolph Feiss, and Meyer Guggenheimer, "impleaded, &c.," defendants, that they

have been sued by The First National Bank of Cincinnati, cross-petitioners, in the court of common pleas of Hamilton county, and that unless they answer by the 20th day of February, A. D. 1886, the answer and cross-petition of the said cross-petitioners against them filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 1st day of February, A. D. 1886.

Witness my hand and the seal of the said court, at Cincinnati, this 23rd day of January, one thousand eight hundred and eighty-six.

DANIEL J. DALTON,

[SEAL.] *Clerk of the Court of* Court of *Common Pleas, Hamilton County, Ohio,*

By W. H. SARGENT, *Deputy.*

10 Service on cross-petition of First Nat'l bank, Cincinnati, accepted for Meyer Guggenheimer.

LONG, AVERY, KRAMER & KRAMER,

Attorneys.

January 27, 1886.

For William Stix and Robert O. Strong & James H. Robb, trustees.

KEBLER & ROELKER.

1886, January 27.—Service acknowledged for Myer Guggenheimer by Long, Avery, Kramer & Kramer, his attorneys, as above, and service acknowledged for William Stix by Kebler & Roelker, his attorneys, and on the 28th I served the within-named Moritz Loth by leaving a true copy of this writ, with endorsements thereon, at his usual place of residence, and on the 30th served J. D. Hearne by delivering to him personally a true copy hereof, with endorsements thereon; also served the Third National Bank of Cincinnati, O., by delivering to J. D. Hearne, the president of said bank, personally a true copy hereof, with endorsements thereon, at the business office of said bank. As to Adolph Feiss, "not found."

SAMUEL BERESFORD, *Sh'ff,*

By JOS. E. HART, *Deputy.*

Sh'ff's Fees.

Copies	1 92
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11 [Endorsed:] No. 74375. Hamilton common pleas. Meyer Guggenheimer, plaintiff, *vs.* Moritz Loth *et al*, defendants. Summons in action for sale of real estate, for service, and for general relief, on cross-bill of First National B'k of Cin'ti, O. Pl'ff'- Ex. C., April 26, '89. To 1 day of February, 1886. Lincoln, Stevens & Lincoln, att'y-. Rec'd Jan. 25, 1886. Samuel Beresford, sheriff.

12 Pl'tff's' Ex. "D" to Deposition of J. Hampden Robb.

State of Ohio, }
County of Hamilton. }

Court of Common Pleas.

Meyer Guggenheimer, Plaintiff,
vs.
Moritz Loth, Fredericka Loth, His Wife; James Hampden Robb and Charles E. Strong, Trustees, *et al.*, Defendants. } No. 74375.

Answer and Cross-petition of James Hampden Robb and Charles E. Strong, Trustees.

Now come James Hampden Robb and Charles E. Strong, trustees, and, for answer to the plaintiff's petition and the answers and *answers and* cross-petitions heretofore filed in this cause, state they are ignorant of the truth of the allegations therein contained, and therefore deny the same and demand strict proof thereof.

For cross-petition these defendants state that Moritz Loth, together with Frederika Loth, his wife, who released her dower therein on the fifth day of February, A. D. 1885, duly executed and delivered to these defendants his certain warranty deed, thereby conveying to these defendants, their successors, heirs, and assigns forever, the following real estate, all situated in the city of Cincinnati, county of Hamilton, and State of Ohio, on the westerly side of Vine street, north of Mulberry street, viz., lots marked and numbered 3, 4, & 5 of 20 ft. front each of the subdivision of the tract of land
13 beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet and extending back westwardly of same width 132 feet, commencing for numbers from the south, making 5 lots of 20 feet front each, said lots 3, 4, and 5 herein conveyed being 60 feet in front on the west side of Vine street, and being the same conveyed to said M. Loth by John Shelley by deed recorded in Deed Book 401, page 382, Hamilton county records; also all that other real estate in said city of Cincinnati, viz:

Being all that part of lot No. 2, block 12, on the plat of subdivision made by Gen'l James Findlay, J. C. & J. L. Ludlow, recorded in Book 49, pages 420 to 422, as said block 12 is now subdivided by commissioners in partition of James & Jane Findlay, which fronts 50 feet on the west side of Vine street and extending westwardly of same width in rear as in front to the depth of 100 feet, which lot 2, in said block 12, was set off by said Findlays' commissioners to John King Findlay and by him conveyed to said M. Loth by deed recorded in Deed Book 358, page 571, Hamilton county records; also all that other lot of land in said city of Cincinnati, viz:

All that part of lot 4 on the plat of subdivision made by said

Findlays' commissioners of block 12 on said Findlay and Ludlow's plat as fronts 50 feet on the west side of Vine street, extending back westwardly of even width in rear as in front to the depth of 100 feet, said 50 feet front on the west side of Vine street by 100 ft. deep of said lot 4, block 12, of Findlay and Ludlow's —, having been, with the rest of lot 4, set off by the Findlay commissioners to James F. Irwin and by him conveyed to said M.
14 Loth by deed recorded in Deed Book 389, page 320, Hamilton county records; also all that other lot in Cincinnati aforesaid adjoining the easterly line of the lot last described, fronting 17 feet on the west side of Vine street, running back westwardly of even width in rear as in front to the depth of 100 feet, said lot hereby leased being off the westerly part of lot 5 as marked by Findlays' commissioners on a plat of subdivision of block 12 of Findlay and Ludlow's subdivision, said lot 5 having been set off by said Findlays' commissioners to William Irwin, and the part herein described having been deeded by the Franklin Bank of Cincinnati to said M. Loth by deed recorded in Book 401, page 381, Hamilton county records; that said deed was at the time of its date delivered to these defendants in consideration of ten thousand dollars at that time paid by them to said Moritz Loth; that said deed was duly left for record on February 7th, 1885, at 10 o'clock a. m., with the recorder of Hamilton county and recorded in Deed Book 577, page 569, Hamilton county records; that these defendants, with said Moritz Loth, duly executed and delivered to each other on the fifth day of February, A. D. 1885, their certain indenture of lease, which said lease was duly executed by said James Hampden Robb and Charles E. Strong, trustees, and Moritz Loth, and was duly recorded in Lease Book 78, page 99, Hamilton county records; that by said lease said trustees leased to said Loth the same premises conveyed by said Loth to said trustees, as hereinbefore described, for and during the joint lives of Ellen W. Robb and Mary Robb, her daughter, and the survivor of them, said Loth covenanting to pay during the life of Ellen W. Robb and for six months thereafter at the rate of $600 a year, payable in half-yearly install-
15 ments of $300 each on the 1st of August and February of each year, the first instalment being payable August 1st, 1885, and, further, to pay six months after the death of Ellen W. Robb $5,000 to these trustees or the survivor of them, and also $5,000 more at that time in the event of Mary Robb's being then deceased, but in case of Mary then being alive after Ellen W. Robb's death and the payment of said first $5,000 to pay during Mary Robb's life at the rate of $300 a year, payable in half-yearly instalments of $150, and further paying upon the death of said Mary Robb a further sum of $5,000. Said Loth further covenanted to pay all taxes and assessments levied, rated, or charged upon said premises during the life of this lease; to keep said premises insured in $5,000, loss payable or to be used in repairing and rebuilding said premises; to keep the improvements on said premises in as good order and repair as they were at the date of the lease. Said lease further provided that said trustees, the lessors, should, upon

the death of said Ellen W. and Mary Robb and the payment to them of all rents and the further sum of $10,000, convey said leased premises to said Moritz Loth by deed of special warranty. Said lease further provided that if said Loth should fail to make the payments therein stipulated within 30 days after the same became due and without demand therefor, or should fail to pay the taxes, assessments, or premiums of insurance that might become due, or to keep and perform any other of the covenants and agreements by him to be kept and performed, then it should be lawful for said lessors into said premises to re-enter and the same to have again, repossess, and enjoy as in their first and former estate, and thereupon said lease, at the option of said lessors, should
16 cease and determine, and these defendants file herewith and mark "Exhibit A" a copy of said lease.

These defendants further state that said Moritz Loth accepted and took possession under said lease and paid the taxes for the last half of 1884, and also the rental due August 1st, 1885, and that said Ellen W. Robb and Mary Robb are still living.

Wherefore these defendants ask that their interests be protected in the premises, and for all proper and equitable relief.

By KEBLER & ROELKER,
Attorneys for James Hampden Robb and Charles E. Strong, Trustees.

STATE OF OHIO, }
County of Hamilton, } ss:

Charles A. Kebler states he is one of the attorneys of the above-named defendants; that said defendants are non-residents of the State of Ohio and absent therefrom, and that the allegations in the foregoing pleadings are true, as he believes.

CHARLES A. KEBLER.

Sworn to before me and subscribed in my presence this December 8th, 1885.

40c. due notary.

——— ———,
Notary Public, Hamilton County, Ohio.

Answers of James Hampden Robb and Charles E. Strong, Trustees, to Interrogatories Propounded by Plaintiff in His Petition.

17 In answer to first interrogatory. The sum of ten thousand dollars to Moritz Loth.

To second interrogatory. None.

To third interrogatory. The lease filed with this pleading and marked "Exhibit A."

To fourth interrogatory. None except "Exhibit A," filed herewith.

To fifth interrogatory. Yes; "Exhibit A" as above.

To sixth interrogatory. Kebler & Roelker, as our attorneys, collect the rental provided for by lease, "Exhibit A" aforesaid; Moritz Loth, we suppose, of the property itself.

To seventh interrogatory. The interest as evidenced by lease, "Exhibit A" aforesaid.

To eighth interrogatory. A. Yes; $10,000.

To ninth interrogatory. The consideration was paid at the time of the delivery of the deed.

CHARLES A. KEBLER.

STATE OF OHIO, }
County of Hamilton, } ss:

Charles A. Kebler, being duly sworn, states he is attorney of Robb & Strong, trustees, and was on February 5, 1885; that said trustees are non-residents of this State and absent therefrom; that the foregoing answers are within his personal knowledge and true.

CHARLES A. KEBLER.

18 Sworn to before me and subscribed in my presence this December 8th, 1885.

FERD. JELKE, JR.,
Notary Public, Hamilton County, Ohio. [SEAL.]

19 [Endorsed:] No. 74375. Hamilton county court of common pleas. Meyer Guggenheimer, plaintiff, *vs.* Moritz Loth, Frederika Loth, his wife; James Hampden Robb and Charles E. Strong, trustees, *et al.*, defendants. Answer and cross-petition of James Hampden Robb and Charles E. Strong, trustees. Pl'ff's Ex. D, April 26, '89. Filed Dec. 12, 1885. D. L. Dalton, clerk. Kebler & Roelker, attorneys. Clerk's fees, 05, paid by Kebler & R.

20 PL'T'FFS' EX. "E" TO DEPOSITION OF J. HAM-DEN ROBB.

Hamilton Common Pleas Court.

MEYER GUGGENHEIMER, Plaintiff, }
vs. } No. 74375.
MORITZ LOTH *et al.*, Defendants. }

Answer of James H. Robb and Charles E. Strong, Trustees, to Cross-petition of W. Stix.

Now come James H. Robb and Charles E. Strong, trustees, and reiterates the allegations in their answer and cross-petition heretofore filed, and, by way of answer to the cross-petition of William Stix filed in this action, state that they admit the allegations therein, except that they allege that the lien on the property described in their answer and cross-petition heretofore filed is prior in time to the lien of William Stix upon said property.

These defendants further state that Ellen W. Robb is still alive, and that Moritz Loth has failed to pay the rental due on February 1st, 1886, and that the same is now due and unpaid, and that these

defendants are entitled to have said premises sold for payment of said rental, and join in the prayer of William Stix for the appointment of a receiver and for the sale of said premises, and further ask that the fee simple of the premises described in their answer and cross-petition heretofore filed be sold, and that they be repaid the ten thousand dollars coming due to them upon said sale: three hundred dollars due on February 1st, 1886, and interest thereon, and interest on said ten thousand dollars from said February 1st,
21 1886, payable semi-annually, and further ask for the appointment of a receiver.

Wherefore these defendants ask that their interest be protected, and for all other proper and equitable relief.

By KEBLER & ROELKER,
Attorneys for Jas. H. Robb and Chas. E. Strong, Trustees.

STATE OF OHIO, }
County of Hamilton, } *ss:*

Charles A. Kebler states that he is one of the attorneys for James Hampden Robb and Charles E. Strong, trustees; that they are both absent from the State of Ohio and non-residents thereof, and that the allegations in the foregoing answer are true, as he believes.

CHARLES A. KEBLER.

Sworn to before me and subscribed in my presence this 21st day of July, 1886.

GEORGE SIDNEY TYLOR,
Notary Public, Hamilton County, Ohio. [SEAL.]

40c. due notary.

22 [Endorsed:] No. 74375. Hamilton county court of common pleas. Meyer Guggenheimer, plaintiff, *vs.* Moritz Loth *et al.*, defendants. Pl'ff's Ex. E, April 26, '89. Answer of Robb & Strong, trustees, to cross-petition of Wm. Stix. (500.) Filed July 21, 1885. D. J. Dalton, clerk. Kebler & Roelker, att'ys. Clerk's fees, .05. Paid by Kebler & R.

23 PL'T'FF'S EXHIBIT "F" TO DEPOSITION OF J. HAMPDEN ROBB.

Hamilton County Court of Common Pleas.

Decree.

MEYER GUGGENHEIMER, Plaintiff,
vs.
MORITZ LOTH, FREDERIKA LOTH, His Wife; ADOLPH Feiss, William Stix, The National Park Bank of New York, a Corporation Duly Created Under the Laws of the United States; Bernhard Bettman, Abraham J. Friedlander, Ricka Amberg, The First National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; Elijah Newman, Frederick S. Pinkus, Otto Jeffe, & Frederick S. Pinkus, as O. Jeffe & Pinkus; J. D. Hearne, The Third National Bank of Cincinnati, a Corporation Duly Created under the Laws of the United States; The Commercial Bank of Cincinnati, a Corporation Duly Created under the Laws of Ohio; James Hampden Robb & Charles E. Strong, Trustees; Henry W. Taylor, Bertha Mann, Fannie Mann, Henry Adler, Louis Adler, Phillip Stromberg, Abraham Reeser, August Vos, George A. Clark & Co., George A. Clark, The City of Cincinnati for the Use of Thomas Lloyd, and The City of Cincinnati for the Use of B. D. Barton, Defendants. } No. 74375.

This case coming on for hearing upon the cross-petition of William Stix and upon the amended and supplemental answer and cross-petition of William Stix, the petition of plaintiffs, and the other pleadings in this cause and testimony, the court, upon
24 further consideration, find that Moritz Loth and Fredericka Loth, his wife, have been duly served by the sheriff of Hamilton county with process in this cause and are legally before court, and that they are in default for answer or demurrer to the answer and cross-petition and amended and supplemental answer and cross-petition of William Stix, and also to the answer and cross-petition of Henry W. Taylor.

The court further find that on March 30th, 1885, Moritz Loth, in consideration of ten thousand dollars ($10,000.00) then loaned to him by William Stix, executed and delivered to said William Stix four notes of that date, made by said Moritz Loth, payable to the order of said William Stix, with interest after maturity at the rate of seven per cent. per annum, payable semi-annually; three of said notes being for one hundred and seventy-five dollars ($175.00) each, payable nine (9), twelve (12), and fifteen (15) months after date. respectively, the fourth note being for ten thousand dollars ($10,000.00), payable six years after date, with the agreement, however, that should any one of twenty-four (24) one hundred and seventy-five

dollar ($175.00) interest notes not be paid at maturity, then said ten thousand dollar note should become due, payable, and collectable, and the mortgage securing the same foreclosable immediately after any such default.

The court further find that three of said notes, payable nine (9), twelve (12), and fifteen (15) months after date, were not paid at maturity and are still unpaid.

That by reason of the non-payment of said three notes, payable nine (9), twelve (12), and fifteen (15) months after date, said ten thousand dollar note became due, payable, and collectable,
25 and that the same is now due, payable, and collectable, and that the said four notes are wholly unpaid, and that there is due to said William Stix from said Moritz Loth upon said four notes the sum of ten thousand nine hundred and five dollars and fifty-six cents ($10,905.56), with seven per cent. (7%) interest from the third day of January, 1887, payable quarterly.

It is therefore the judgment of this court that said William Stix recover from said Moritz Loth said sum of $10,905.56, with seven per cent. interest from the 3rd day of January, 1887, payable quarterly.

This cause further coming on for hearing, upon the answer and cross-petition and the amended and supplemental answer and cross-petition of Henry W. Taylor, the court find that in consideration of the sum of eight thousand (8,000) dollars then loaned and paid to him by said Henry W. Taylor, said Moritz Loth, upon the date therein set out, executed and delivered to said Henry W. Taylor the deed set out in said cross-petition of Henry W. Taylor, and that Henry W. Taylor thereupon executed and delivered the lease therein set out to said Moritz Loth, and that said deed and lease were in real-ty a mortgage to secure the payment of said sum of $8,000.00, with interest at six per cent. per annum, payable semi-annually.

The court further find that by the non-payment of the instalments of rent provided for in said lease the principal amount $8,000.00 has become due, payable, and collectable and that the installments of said interest or rent falling due on January 28, 1886, two hundred and forty dollars (240), and July 28, 1886, two hundred and forty dollars ($240), are all due, payable, and collectable,
26 and that there is due to said Henry W. Taylor from said Moritz Loth for the instalment therein named, and the amount originally loaned, the sum of $8,707.16, with six per cent. interest from the third day of January, 1887, payable semi-annually.

It is therefore the judgment of this court that said Henry W. Taylor recover from said Moritz Loth the sum of $8,707.16, with interest at six per cent. from the third day of January, 1887, payable semi-annually.

The court further find that said Moritz Loth, in order to secure the prompt payment of the notes made to the order of William Stix, executed and delivered to said William Stix a mortgage dated

March 30th, 1885, upon all that real and leasehold estate in Hamilton county, Ohio, described as follows, to wit:

The following leasehold estate in the city of Cincinnati, county of Hamilton and State of Ohio, viz:

1. Being parts of lots five (5), six (6), and seven (7), on plat N, made by commissioners in partition of the estate of Jane and James Findlay, in causes Nos. 9569 and 9570 of the Hamilton county court of common pleas, as recorded in vol. 222 of said records, said lots 5, 6, and 7 being part of block 12, in Findlay and Ludlow's plat, recorded in Deed Book 49, page 420, Hamilton county records, the parts of said lots herein conveyed being described as follows:

Commencing at a point on the west side of Vine street seventeen and forty-one hundredths (17.41) feet north of the southeast corner of said lot five (5); thence west on a line parallel with the south line of said lot one hundred (100) feet to a point; thence
27 north on a line parallel with Vine street eighty-two and fifty-nine hundredths (82.59) feet to the north line of said lot six (6); thence east along the north line of said lot (6) one hundred (100) feet to the west side of Vine street, and thence south along the west side of Vine street eighty-two and fifty-nine hundredths (82.59) feet to the point of beginning.

Also forty-four (44) feet, more or less, on the west side of Vine street, part of lot seven (7) aforesaid, being all the space between the southerly line of the lot formerly owned by M. Plunket, and the north line of lot six aforesaid, and running back west along the line of lot seven (7), ninety (90) feet in depth, being narrower in the rear than in front; all the above-described premises being the same conveyed by Loth and wife to Henry W. Taylor by deed recorded in Deed Book 578, page 347, Hamilton county records, and perpetually leased by said Taylor to said Loth by lease recorded in Lease Book 76, page 582, Hamilton county records.

2. (*a.*) Also the following-described leasehold estate in the aforesaid city, county, and State on the west side of Vine street north of Mulberry street, viz:

Lots marked and numbered three (3), four (4), and five (5), of twenty (20) feet front each of the subdivision of the tract of land beginning on the west side of Vine street at the line between land formerly owned by E. B. Reeder and land of the heirs of Findlay, thence running south on Vine street one hundred (100) feet and extending back west of the same width one hundred and thirty-two (132) feet, commencing for numbers from the south, making
28 five lots of twenty (20) feet from each, said lots three (3), four (4), five (5), herein described, being sixty (60) feet in front on the west side of Vine street, and being the same conveyed to said Moritz Loth by John Shelley by deed in Book 401, page 382, Hamilton county records.

(*b.*) Also all that other leasehold estate in the aforesaid city, county, and State, viz:

All that part of lot two (2), block 12, on the plat of subdivision laid out by Gen. James Findlay, J. C. & J. L. Ludlow, recorded in Book 49, pages 420 to 422, Hamilton county records, as

said block 12 is now subdivided by commissioners in partition of the estate of James and Jane Findlay, which fronts fifty (50) feet on the west side of Vine street and extending back westwardly of the same width in rear as in front one hundred (100) feet, said lot two (2) having been set off by said Findlay's commissioners to John King Findlay and conveyed by said J. K. Findlay to Moritz Loth by deed in Book 358, page 571, Hamilton county records.

(*c.*) Also all those leasehold premises in the aforesaid city, county, and State described as follows:

All that part of lot four (4) on the plat of subdivision made by said Findlay's commissioners on block 12 on said subdivision made by Findlay & Ludlow as fronts fifty (50) feet on the west side of Vine street, extending back west, of even width in rear as in front, one hundred feet, all of said lot four (4) having been set off by said Findlay's commissioners to James F. Irwin and by him conveyed to said Moritz Loth by deed recorded in Deed Book 389, page 320, Hamilton county records.

(*d.*) Also all those leasehold premises adjoining the easterly
29 line of lot last described, fronting seventeen (17) feet on the west side of Vine street and running back of even width in rear as in front one hundred (100) feet, said seventeen (17) feet being off the west part of lot five (5) as marked by Findlay's commissioners on a plat of subdivision of block 12 of Findlay & Ludlow's subdivision, said lot five (5) being set off by said commissioners to William Irwin and the seventeen feet herein described being conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed in Deed Book 401, page 381, Hamilton county records, all the foregoing leasehold premises from the number "2," near the end of the fifth page hereof, and marked "a," "b," "c," "d," being the same premises conveyed by Loth and wife to Robb & Strong, trustees, by deed dated February 5th, 1885, recorded in Deed Book —, page —, Hamilton county records, and by Robb & Strong, trustees, leased to said Loth by lease dated February 5th, 1885, and recorded in Lease Book —, page —, Hamilton county records.

3. Also the following-described real estate, viz: The south twenty-five (25) feet of lot ninety-six (96), the whole of lot ninety-seven (97), the north thirty-five (35) feet of lot ninety-eight (98), on the west side of Fox (now Loth) street, in a subdivision of lots among the heirs of James and Jane Findlay of block 11 of Findlay & Ludlow's subdivision, the real estate above described fronting one hundred and ten (110) feet on the west side of Loth street and running back of even width in rear as in front to the west line of said lots, and being part of the same premises conveyed to Moritz
30 Loth by Wm. Rankin and wife by deed in Deed Book 401, page 387, Hamilton county records.

And that said Fredericka Loth, his wife, united with her husband in the execution of said mortgage, and that the same was legally executed by them and was duly recorded in the records of Hamilton county in Mortgage Book 496, page 524, on the ninth day of April, 1885, at 11.50 o'clock a. m., and is in full force, and that said William Stix is the owner of the same.

The court further find that the condition of said mortgage to William Stix has been broken and that William Stix is entitled to have the equity of redemption of said defendants, Moritz Loth and Fredericka Loth, his wife, and said mortgaged premises foreclosed to and have said premises sold for the payment of the amount due to him.

It is further ordered and it is ordered with the consent of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, that the fee-simple title of the premises described in said mortgage to William Stix be sold and said premises sold freed from the claims of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, and all other parties to this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale.

And it further appearing to the court that the real estate described in said mortgage will bring a better price if sold by a special master commissioner who is acquainted with the property and
31 who can sell the same on the premises and advertise by posters, &c., it is ordered and is therefore the judgment of the court that unless Moritz Loth and Fredericka Loth, his wife, or some one for them, within five days from the entry of this judgment pay to William Stix or his attorneys, Kebler, Roelker & Jelke, the sum of $10,905.56, with interest at seven per cent. from the third day of January, 1887, payable quarterly, and pay the costs of this court, taxed at $——, the equity of redemption of said Moritz Loth and Fredericka Loth, his wife, be foreclosed and said premises shall be sold and an order of sale shall issue therefor to George Sidney Tylor, special master commissioner of this court, hereby appointed for that purpose, directing him to sell said premises, freed from the claims of all parties to this action, as upon execution, and bring the proceeds into court for further order, and all questions of priority of lien are reserved for the further consideration of this court.

It is further ordered that said sale shall be upon the premises, and that the different parcels be separately appraised, and that the terms of sale shall be either all cash or, at the purchaser's option, one-fourth cash and the balance in one, two, and three years, the deferred payments to bear interest from date, payable annually, and be secured by purchase-money mortgage upon the premises sold, and said special master is authorized to expend a reasonable sum of money for duly advertising the same by posters, hand-bills, &c., and engaging an auctioneer for the same, and it is ordered
32 that before entering upon his duties said George Sidney Tylor shall enter into an undertaking to the approval of this court and conditioned according to the law in the sum of fifteen thousand dollars.

And thereupon came said George Sidney Tylor and accepted said appointment, and as such special master presented his bond, with Emily H. Tylor & Daniel Collier as securities, which was approved by the court, and thereupon said George Sidney Tylor was

duly sworn by the court and took the oath of office as such special master.

33 [Endorsed:] 74375. Hamilton county common pleas court. Meyer Guggenheimer, plaintiff, *vs.* Moritz Loth *et al.*, defendants. Decree. Consent. Perry & Jenney, for H. W. Taylor. Lincoln, Stephens & Lincoln, for 1st Nat. bank. Feb. 15, '87. Ent. Min., 260. Enter. S. W. M. Pl'ffs' Ex. F. April 26, '89.

34 And afterwards, to wit, on the 2nd day of October, A. D. 1888, the following transcript of proceedings from the superior court of Cincinnati was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Superior Court of Cincinnati, Hamilton Co., Ohio.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, Plaintiffs, *vs.* AUGUST VOS and WILLIAM STIX, Defendants. } # 4182. Petition.

The plaintiffs say that heretofore, to wit, on the 13th day of November, 1885, they were seized in fee, but upon trust, to secure the payment to Ellen W. Robb for her natural life the sum of $600 per annum and to Mary Robb for her life, if she should survive the said Ellen W. Robb, of the sum of $300.00 per annum, and after the death of both Ellen W. Robb and Mary Robb for the distribution of the estate of James Robb, deceased, of the following-described real estate, situate, lying, and being in the city of Cincinnati, Hamilton county, Ohio, and described as follows: Lying on the westerly side of Vine street north of Mulberry street, to wit:

Lots 3, 4, and 5 *and* 20 feet front each of the subdivision of tract of land beginning at the west side of Vine street at a line between land formerly owned by E. F. Reeder and land of the heirs of Findlay, thence running south on Vine street 100 feet and extending back westwardly of the same width 132 feet, commencing for numbers from the south, making 5 lots of 20 feet front each, said lots
35 3, 4, and 5, then belonging to these plaintiffs, being 60 feet in front on the west side of Vine street, said lots being the same property conveyed by John Shelly to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilton county, Ohio, and also by E. F. Reeder to Moritz Loth by deed recorded in Book 401, page 387, records of deeds of Hamilton county, Ohio.

And also all that other real estate situated in said city of Cincinnati, to wit, all that part of lot marked and numbered 2, block 12, in the plat of subdivision laid out by Gen. James Findlay, J. C. and I. L. Ludlow, recorded in Book 49, page 420 and 422, as now subdivided by the commissioner in the case of partition of James and John Findlay, which fronts 50 feet on the west side of Vine street, extending westwardly of the same width in rear as in front

to the depth of 100 feet, and lot 2, in said block 12, Findlay and Ludlow subdivision, was set off by the Findlay commissioners to John Keene Findlay, and was conveyed by said John Keene Findlay to said Moritz Loth by deed recorded in Book 358, page 571, of the records of deeds of Hamilton county, Ohio.

Also all that part of lot No. 4, in the plat of the subdivision made by Findlays' commissioners of block 12, on the said plat of the subdivision laid out by Findlay and Ludlow, as fronts 50 feet on the west side of Vine street, extending back westwardly of even width in rear as in front to the depth of 100 feet, said 50 feet front on the west side of Vine street by 100 feet deep being the same property set off with the rest of said lot 4 by Findlays' commissioners to James F. Irwin and conveyed by said James F. Irwin to Moritz Loth by deed recorded in Book 389, page 320, of the records of deeds
36 of Hamilton county, Ohio.

Also that other certain lot in the city of Cincinnati aforesaid, adjoining the westerly line of the lot last described, fronting 17 feet on the west side of Vine street, running back westwardly of even width in rear as in front to the depth of 100 feet, said lot being 17 feet off the westerly part of lot 5, as marked by Findlays' commissioners on the plat of subdivision of block 12 of Findlay & Ludlow's subdivision aforesaid, the said lot being the property heretofore conveyed to Moritz Loth by the Franklin Bank of Cincinnati by deed recorded in Book 401, page 381, of the records of deeds of Hamilton county, Ohio, and that the said premises were occupied by one Moritz Loth under and by virtue of a lease from these defendants for the term of 99 years, renewable forever, and that in said lease there was a provision whereby said Moritz Loth had the right and privilege of purchasing said premises at and for the price and sum of $10,000.

And the plaintiffs further say that on said day one Meyer Gugenheim, having recovered by the consideration of the court of common pleas of Hamilton county, O., a judgment against the said Moritz Loth, brought suit in the said court of common pleas, numbered 74375, in the said court against the said Moritz Loth and these plaintiffs and divers other persons, praying, among other things, that these plaintiffs might be declared to hold said lands by way of mortgage as security for the said purchase price of said lands of $10,000, and that the said lands might be sold free from any claims of these plaintiffs and all other persons parties thereto, to satisfy the judgment of the said Meyer Gugenheim and the claims of the divers other persons therein made defendants.

37 And these plaintiffs further say that in said cause no summons or other process was ever issued for these plaintiffs (who then were and ever since have been non-residents of Ohio) and no advertisements was ever made for these plaintiffs, and that they had no notice of said proceedings; and these plaintiffs further say that thereafter, to wit, on the 18th day of December, 1885, one Chas. A. Kebler, then engaged in the practice of the law with one Frederick G. Roelker under the firm name and style of Kebler and Roelker in the said city of Cincinnati, did, without authority

from these plaintiffs and without their knowledge, enter the appearance of these plaintiffs in said case, and did file an answer therein on behalf of these plaintiffs, using for that purpose said firm name of Kebler and Roelker.

And these plaintiffs further say that thereafter, to wit, prior to the 11th day of May, 1887, the said firm of Kebler and Roelker was dissolved, and the said Chas. A. Kebler, the said Frederick G. Roelker, and one Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of the law in said city of Cincinnati, under the firm name and style of Kebler, Roelker and Jelke, as successors to the said firm of Kebler and Roelker; and these plaintiffs further say that thereafter all steps in said cause purporting to be on behalf of *of* these plaintiffs were taken in the name of the said firm of Kebler, Roelker and Jelke.

And these plaintiffs further say that all steps taken in said cause at any time purporting to be on behalf of these plaintiffs were taken without the knowledge of these plaintiffs and without any authority from these plaintiffs; and these plaintiffs say that all orders, decrees, and judgments entered in said cause purport
38 to *to* have been entered by and with the consent of these plaintiffs, but that the same were entered by the said Kebler, Roelker and Jelke and without the knowledge, consent, or authority of these plaintiffs, and that these plaintiffs had no knowledge of said cause or the institution thereof, or of any proceeding therein, until December 2nd, 1887, being long after the conveyance of said lands to the purchasers thereof, in pursuance of the pretended sale made in said case.

And these plaintiffs further say that such proceedings were had in said cause number 74375 that the said premises were sold by one George Sydney Tyler, who was appointed special master commissioner by said court of common pleas for the purpose of making said sale of property, and that said special master commissioner purported to make said sale free of the claims of these plaintiffs and of all other persons whatever parties to said cause, and that the said parcels of land were purchased respectively at said sale by the said August Vos purchasing lots numbered 3, 4, and 5, hereinbefore described, of the subdivision of the tract of land on the west side of Vine street 100 feet front and extending back westwardly 132 feet of the same width in front as in rear, and the said Wm. Stix purchasing the other lots hereinbefore described, to wit, all those parts of lots 2, 4, and 5 of block 12 of Findlay and Ludlow subdivision hereinbefore described.

And these plaintiffs further say that in said cause numbered 74375 a decree was made on the 19th day of May, 1887, whereby it was ordered, adjudged, and decreed that the said George Sydney Tyler, special master commissioner in said case, pay to these plaintiffs or to Kebler, Roelker and Jelke, purporting to be their
39 attorneys in said cause, out of the proceeds of said sale the sum of $11,361.66.

And these plaintiffs further say that thereafter, on the 16th day of June, 1887, the said George Sydney Tyler, special master com-

missioner, as ordered by the decree of said court, but without the knowledge and consent of these plaintiffs and without their authority, did pay to the said Kebler, Roelker and Jelke, and the said Kebler, Roelker and Jelke received, the said sum of $11,361.66, and that no portion of the said sum has been received by these plaintiffs or been accounted to for them.

And these plaintiffs say that they were never parties to said cause in law or in fact, and that the said sale as to them is null and void.

And these plaintiffs further say that the said transactions between them and said Moritz Loth were in truth and in fact a loan by them to the said Moritz Loth of the sum of $10,000, in consideration whereof the said Moritz Loth conveyed to them the premises hereinbefore described, and they executed to the said Moritz Loth the lease hereinbefore described, containing the privilege of purchase for the said sum of $10,000; and they say that in consequence thereof they have a first and best lien upon the said premises in the said sum of $10,000, with interest thereon, and that there is and remains due and unpaid thereon the sum of $10,000, with interest thereon from January 1st, 1885, at six per cent. per annum.

Wherefore the plaintiffs pray that the said claim may be established as a first and best lien on the said premises, and that unless the defendants shall pay to them the said sum of $10,000.0–, with interest as aforesaid, at a short day to be fixed by the court
40 that the said premises may be sold for the satisfaction of their said claim, and for such other and further relief as they may show themselves to be entitled in equity and good conscience.

HARMON, COLSTON, GOLDSMITH AND HOADLY,
Attorneys for Plaintiffs.

STATE OF OHIO, *Hamilton County,* } ss:

George Hoadly, Jr., being duly sworn, says he is one of the attorneys for the plaintiffs in the above-entitled action, and that such plaintiffs are now absent from the State of Ohio, and that the facts stated in the above and foregoing petition are true, as he believes.

GEO. HOADLY, JR.

Sworn to before me and subscribed in my presence this 10th day of May, 1888.

JOHN J. SULLIVAN,
Notary Public, Ham. Co., Ohio. [SEAL.]

41 [Endorsed:] No. 43368. Superior court of Cin. James Hampden Robb and Chas. E. Strong, plaintiffs, against August Voss & Wm. Stix, defendants. Petition. Action for equitable relief. Filed May 12, 1888. Dan'l J. Dalton, clerk. Issue summons. Harmon, Colston, Goldsmith & Hoadly, att'ys for plaintiffs and security for costs.

42 *Summons.*

THE STATE OF OHIO, }
Hamilton County, City of Cincinnati. }

Superior Court of Cincinnati.

To the sheriff of the county of Hamilton:

You are commanded to notify August Vos and William Stix, defendants, that they have been sued by James Hampden Robb and Charles E. Strong, trustees, plaintiffs, in the superior court of Cincinnati, and that unless they answer by the 9th day of June, A. D. 1888, the petition of the said plaintiffs against them filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 21st day of May, A. D. 1888.

Witness my hand and the seal of said court, at Cincinnati, this 12th day of May, A. D. 1888.

DANIEL J. DALTON,
Clerk of the Superior Court of Cincinnati.
By W. H. SARGENT, *Deputy.* [SEAL.]

43 [Endorsed:] No. 43368. Superior court of Cin'ti. Jas. H. Robb *et al.*, plaintiffs, *vs.* August Vos *et al.*, defendants. Summons in action for equitable relief. Filed May 21, 1888. Daniel J. Dalton, clerk. To 21st day of May, 1888. Harmon, C., G. & H., att'ys.

CINCINNATI, *May* 18, 1888.

Served the within-named defendant, August Vos, by delivering to him personally a true copy of this writ, with all the endorsements thereon; other defendant not found.

LEO SCHOTT, *Sheriff,*
By GEO. W. DRAPER, *Deputy.*

Sheriff's Fees.

Service and return	40
Copies	80
Mileage	20
	$1 40

44 STATE OF OHIO, }
Hamilton County. }

Superior Court of Cincinnati.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, Plaintiffs, *vs.* AUGUST VOS and WILLIAM STIX, Defendants.	Answer and Cross-petition of Defendant August Vos.

The defendant August Vos, for answer to the plaintiffs' petition and by way of cross-petition against said plaintiffs, admits that the

plaintiffs, on the 13th day of November, 1885, were seized in fee, but upon trust, as therein stated, of the real estate described in said petition, and that said premises were occupied by one Moritz Loth under and by virtue of a lease from said plaintiffs for the term of 99 years, renewable forever, and that in said lease there was a provision whereby said Moritz Loth had the right and privilege of purchasing said premises at and for the price and sum of $10,000.

He further admits that on said November 13th, 1885, one Meyer Gugenheim having recovered by the consideration of the court of common pleas of Hamilton county, Ohio, a judgment against said Moritz Loth, brought suit in said court of common pleas, numbered 74375, against said Moritz Loth and said plaintiffs and divers other persons, praying, among other things, that said plaintiffs might be declared to hold said lands by way of mortgage as security for the said purchase price of said lands of $10,000, and that the said
45 lands might be sold free from any claims of said plaintiffs and all other persons parties thereto to satisfy the judgment of the said Meyer Gugenheim and the claims of the divers other persons therein made defendants.

Defendant denies that in said cause no summons or other process was ever issued for said plaintiffs, and they had no notice of said proceeding. He denies that on the 18th day of December, 1885, one Charles A. Kebler, then engaged in the practice of the law with one Frederick G. Roelker, under the firm name of Kebler and Roelker, in said city of Cincinnati, did, without authority from said plaintiffs and without their knowledge, enter the appearance of said plaintiffs in said case and did file an answer therein on behalf of said plaintiffs, using for that said firm name of Kebler and Roelker.

Defendant admits the dissolution of said firm of Kebler and Roelker and the formation of the partnership of Kebler, Roelker and Jelke, composed of said Kebler and Roelker and Ferdinand Jelke, Jr., and that all steps taken in said case after May 11, 1887, purporting to be on behalf of said plaintiffs were taken in name of said firm, Kebler, Roelker and Jelke, as alleged in said petition.

Defendant denies that all steps taken in said cause at any time purporting to be on behalf of said plaintiffs were taken without the knowledge of said plaintiffs and without their consent and without any authority from them. He admits that all orders, decrees, and judgments entered in said cause purport to have been entered by and with the consent of said plaintiffs; but he denies that the same were entered by the said Kebler, Roelker and Jelke without
46 the knowledge, consent, or authority of said plaintiffs, and he denies that said plaintiffs had no knowledge of said cause or the institution thereof or of any proceedings therein until December 2, 1887.

Defendant further admits that such proceedings were had in said cause No. 74375 that said premises were sold by one George Sidney Tyler, who was appointed special master commissioner by said court of common pleas for the purpose of making said sale of property, and that he purported to make said sale free of the claims

of said plaintiffs and of all other persons whatever parties to said cause, and that the said parcels of land were purchased respectively at said sale by the said August Vos, purchasing lots numbered 3, 4, and 5 firstly described in said petition, and the said William Stix, purchasing the other lots therein described.

Defendant also admits that in said cause No. 74375 a decree was made on the 19th day of May, 1887, whereby it was ordered, adjudged, and decreed that the said George Sidney Tylor, special master commissioner in said case, pay to said plaintiffs or to Kebler, Roelker, and Jelke, their attorneys, out of the proceeds of said sale the sum of $11,361.66.

Defendant has no knowledge of the alleged fact that said Tylor, special master commissioner, on the 16th day of June, 1887, paid to said Kebler, Roelker and Jelke said sum of $11,361.66 and does not admit the same, but demands strict proof thereof, but he denies that said payment, if so made, was without the knowledge and consent of said plaintiffs and without their authority, and he also denies that no portion of the said sum has been received by said plaintiffs or been accounted for to them.

47 Defendant denies that said plaintiffs were never parties to said cause in law or in fact, and that the said sale as to them is null and void.

Defendant admits that the said transactions between the said plaintiffs and said Moritz Loth were in truth and in fact a loan by them to the said Moritz Loth of the sum of $10,000.00, in consideration whereof the said Moritz Loth conveyed to them the premises described in said petition, and they executed to the said Moritz Loth the lease thereinbefore described, containing the privilege of purchase for the said sum of $10,000.00; but he denies that in consequence thereof said plaintiffs have a first and best lien upon the said premises or any lien whatever thereon in the said sum of $10,000.00, with interest thereon, or in any sum whatever, and he also denies that there is and remains due and unpaid thereon the sum of $10,000.00, with interest thereon, from January 1st, 1885, at six per cent. per annum, or any sum whatsoever.

Defendant denies each and every allegation in said petition not herein specifically admitted.

Defendant, further answering and by way of cross-petition, says that the said plaintiffs, James Hampden Robb and Charles E. Strong, trustees, were parties defendants to said cause of Meyer Gugenheim *vs.* Moritz Loth and others, No. 74375, in said court of common pleas; that a summons was duly issued therein against them; that they were legally served with process therein; and had due notice of the pendency, object, and prayer of the petition in said cause;

48 that they had knowledge of all orders, judgments, decrees, and proceedings in said cause and consented thereto; that all said proceedings were regular and in conformity with law; that on the 16th day of April, 1887, in *in* pursuance to the decree of said court of common pleas, entered in said cause on the 15th day of February, 1887, and an order of sale issued thereunder on the 25th day of February, 1887, *to* the said George Sidney Tylor, special

master commissioner, duly struck off and sold for the sum of $9,100.00 to this defendant, August Vos, the real estate firstly described in said petition as follows, to wit, "the following-described real estate situate, lying, and being in the city of Cincinnati, Hamilton county, Ohio, and described as follows: Lying on the westerly side of Vine street north of Mulberry street, to wit, lots 3, 4, and 5 and 20 feet front each of the subdivision of a tract of land beginning at the west side of Vine street at a line between land formerly owned by E. F. Reeder and land of the heirs of Findlay, thence running south on Vine street one hundred feet and extending back westwardly of the same width one hundred and thirty-two feet, commencing for numbers from the south, making five lots of twenty feet front each, said lots 3, 4, and 5 being sixty feet in front on the west side of Vine street and being the same conveyed by John Shelly to Moritz Loth by deed recorded in Book 401, page 382, of the records of deeds of Hamilton county, Ohio, and also by E. F. Reeder to Moritz Loth by deed recorded in Book 401, page 387, of the records of deeds of Hamilton county, Ohio."

Defendants further say- that he paid the said $9,100.00, the purchase price of said property, to the said Tylor, special master as aforesaid; that afterwards, on the 19th day of May, 1887, the
49 said court of common pleas duly entered a decree in said cause confirming said proceedings and sale and distributing the proceeds thereof and ordering said Tylor as such special master commissioner to convey to said purchaser, this defendant, by deed in fee simple the said premises so sold to him; which deed was duly made and delivered to this defendant on the 24th day of May, 1887, and the same was recorded May 31st, 1887, in Deed Book 635, page 45, of the records of Hamilton county; all of which will more fully appear from the files and records in said cause No. 74375, court of common pleas.

Defendant says that said proceedings, orders, decrees, sale, and deed vested in him a valid title in fee simple to the real estate hereinabove described, free from any and all claims of the said plaintiffs and of the other parties to said cause, and that ever since said sale and conveyance to him he has been and is now in actual possession of the said real estate.

Wherefore this defendant prays that the said claim and interest of the said plaintiffs in and to said real estate may be adjudged to be null and void and that his title aforesaid may be quieted against the same and for all other proper relief.

A. B. HUSTON AND
W. A. GOODMAN,
Att'ys for Defendant August Vos.

STATE OF OHIO, }
Hamilton County, } *ss:*

The above defendant, August Vos, being duly sworn, says that the facts stated in the foregoing answer and cross-petition are true, as he verily believes.

AUGUST VOS.

50 Sworn to and subscribed before me this 7th day of June, 1888.

FRANK C. WALTZ,
Notary Public, Hamilton Co., Ohio. [SEAL.]

51 [Endorsed:] No. 43368. Sup'r court of Cin'ti. James H. Robb and Chas. E. Strong, trustees, *vs.* August Vos and Wm. Stix. Answer and cross-petition of August Vos. Filed June 7, 1888. Daniel J. Dalton, clerk. A. B. Huston and W. A. Goodman, att'ys for August Vos.

52 Superior Court of Cincinnati.

JAMES HAMPDEN ROBB and CHAS. E. STRONG, Trustees,
vs.
AUGUST VOS, WILLIAM STIX, *et al.*

Now come the plaintiffs, James Hampden Robb and Charles E. Strong, trustees, and upon their motion it is ordered that their petition herein filed be, and the same hereby is, dismissed at their costs and without prejudice; and as to the cross-petition of defendants, said cause is continued for further proceedings.

53 [Endorsed:] 43368. Superior court of Cin'ti. James H. Robb *et al. vs.* August Vos *et al.* Entry. Enter. W. H. T. Ent. 1888, June 8. M., 710.

54 Superior Court of Cincinnati.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees,
vs.
AUGUST VOS and WILLIAM STIX. } 43368.

Motion to set aside the entry of June 8th, 1888, dismissing plaintiffs' petition without prejudice.

A. B. HUSTON AND
W. A. GOODMAN,
Attorneys for Defendant August Vos.

June 11, '88.

55 [Endorsed:] 43368. Superior court of Cin'ti. James Hampden Robb *et al. vs.* August Vos *et al.* Motion to set aside entry of dismissal. Filed June 11, 1888. Daniel J. Dalton, clerk. Huston & Goodman, for Vos.

56 Superior Court of Cincinnati.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, Plaintiffs,
vs.
AUGUST VOS and WILLIAM STIX, Defendants. } No. 43368.

Petition for the Removal of Case to the Circuit Court of the United States, Southern District of Ohio and Western Division Thereof.

Your petitioners, James Hampden Robb and Charles E. Strong, trustees, say they are now and at the several times hereinafter mentioned were citizens and residents of the State of New York, and that the said August Vos now is and at the several times hereinafter mentioned was a citizen and resident of the State of Kentucky, and that the said William Stix is and at said time was a citizen and resident of the State of Missouri.

Your petitioners further say that the above-entitled suit is one of a civil nature, where the matter in dispute exceeds, exclusive of interests and costs, the value of $2,000.00, and is one in which there is a controversy on cross-petition between citizens of different States. Your petitioners say that on the 12th day of May, A. D. 1888, they filed their petition in this case praying that this court set aside a certain decree made by the court of common pleas of Hamilton county, Ohio, in case No. 74375, whereby certain lands, tenements, and hereditaments situated in the city of Cincinnati, county
57 of Hamilton and State of Ohio, whereof they were seized as trustees in fee simple, were ordered to be and were sold and conveyed by the order of said court made in said case to the said August Vos and William Stix upon the ground that the appearance of your petitioners as defendants in said cause was entered therein by attorney without any authority whatever therefor and without their knowledge or consent, and that therefore the court acquired no jurisdiction in said case to make said sale of said lands, tenements, and hereditaments, and that the said sale was and is null and void as to them; and that thereafter, to wit, on the 7th day of June, A. D. 1888, said August Vos filed in said case an answer and cross-petition, averring in said cross-petition that by said sale in said case he had acquired a valid title in fee simple to said lands, tenements, and hereditaments, and insisting that said court had jurisdiction and that said sale was valid, and further averring therein that he then was and ever since said sale had been in possession of said lands, tenements, and hereditaments, and by way of cross-petition and affirmative relief did pray that his said title in and to said premises be quieted and that he be adjudged to be the owner thereof by title in fee simple good against your petitioners.

And thereafter, to wit, on the 8th day of June, A. D. 1888, your petitioners did, by leave of court, dismiss their said petition at their costs, and your petitioners further say that they now are and since the dismissal of said petition have been in said case only as defendants to the said cross-petition of said August Vos, and that said William Stix has never been served with summons in said action

and has never appeared therein, and that the controversy as
58 to him is separable.

Your petitioners present herewith a bond of good and sufficient security for entering in the circuit court of the United States, on the first day of its next session, a copy of the record in this case and for paying all costs that may be awarded by said court if it shall hold that this case was improperly removed thereto; and your petitioners pray that this court proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the circuit court of the United States in and for the southern district of Ohio and western division thereof.

HARMON, COLSTON, GOLDSMITH AND HOADLY,
Attorneys for James Hampden Robb and Chas. E. Strong, Trustees.

59 [Endorsed:] No. 43368. Superior court, Cin'ti. James Hampden Robb *et al.*, plaintiffs, *vs. against* August Vos and Wm. Stix, defendants. Petition for removal of case to circuit court of U. S., southern district of Ohio, western division. Filed July 7, 1888. Daniel J. Dalton, clerk. Harmon, Colston, Goldsmith & Hoadly, att'ys for plaintiffs.

60 Superior Court of Cincinnati.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustees, } 49368.
vs.
AUGUST VOS and WILLIAM STIX.

The said James Hampden Robb and Charles E. Strong, trustees, having filed in this court their petition praying for the removal of this cause on the cross-petition of the said August Vos to the circuit court of the United States for the southern district of Ohio and western division, and having presented their bond conditioned as required by law, and the same being approved, it is now ordered *and* that said cause be removed to said circuit court of the United States, and that all further proceedings herein in this court be, and the same hereby are, staid.

61 [Endorsed:] 43368. Superior court of Cin'ti. James Hampden Robb and Chas. E. Strong, trustees, *vs.* August Vos *et al.* Entry for removal to United States court. Enter P. Ent. 1888, July 7. Min., 1010.

62 STATE OF OHIO, } *ss:*
Hamilton County, City of Cincinnati, }

Superior Court.

I, Daniel J. Dalton, clerk of the superior court of Cincinnati, do hereby certify *that* the within and foregoing to be true and correct copies of all pleadings, process, depositions, &c., in the case No.

43368, wherein James Hampden Robb and Charles E. Strong, trustees, are plaintiffs and August Vos *et al.* are defendants, as appears from the files and records now in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Cincinnati, this fifteenth day of September, A. D. 1888.

DANIEL J. DALTON,
Clerk of the Superior Court of Cincinnati,
By W. J. MOLLOY, *Deputy.* [SEAL.]

And afterwards, to wit, on the 4th day of October, A. D. 1888, the following motion was filed in the clerk's office of said court, clothed in the words and figures following to wit:

Motion to Remand Cause.

63 U. S. Circuit Court, S. D. of Ohio, W. Division.

JAMES HAMPDEN ROBB *et al.*
vs.
AUGUST VOS *et al.*
} No. 4182.

The defendant August Vos hereby moves the court to remand this cause to the superior court of Cincinnati for want of jurisdiction in this court.

A. B. HUSTON AND
W. A. GOODMAN,
Attorneys for said August Vos.

And afterwards, to wit, on the 17th day of November, A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal Y, p. 121.

64 Circuit Court of U. S., Southern District of Ohio.

JAMES HAMPDEN ROBB and CHARLES E. STRONG, Trustee-,
vs.
AUGUST VOS *et al.*
} 4182.

This day this cause came on to be heard upon the motion of the defendants August Vos to remand this case to the superior court of Cincinnati and was argued by counsel, and the court, being fully advised in the premises, do find said motion not well taken; it is therefore ordered that said motion be, and the same hereby is, overruled.

To which overruling of said motion the said August Vos hereby excepts.

65 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the district and division aforesaid, do hereby cer-

tify that the foregoing is a true and correct transcript of the transcript, motion, and entry in case No. 4182 of said court and Exhibits A, B, C, D, E, & F referred to in deposition of James Hampden Robb in case No. 4148 of said court, as the same appears of record and on file in clerk's office of said court in said numbered causes, consolidated into case No. 4148, entitled James H. Robb *et al.*, trustees, *vs.* August Vos *et al.*

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Cincinnati, O., this 3d day of January, A. D. 1894.

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. O.,
By ROB'T C. GEORGI, *Deputy*.

[Endorsed:] Case No. 14,267. Supreme Court U. S. October term, 1893. Term No., 252. James Hampden Robb *et al.*, trustees, app'ts, *vs.* August Vos. Stipulation and addition to record. Filed Jan'y 5, 1894.

Robert Clarke & Co., Printers.] [*December, 1893.*

Supreme Court of the United States.

OCTOBER TERM, 1893. TERM NO. 252.

James Hampden Robb and Charles E. Strong, Trustees,

Appellants,

vs.

August Vos and William Stix,

Appellees.

Brief for Appellants on Motion for Writ of Certiorari.

The appellants were complainants in the court below. The object of the suit is to set aside certain deeds to real estate in the city of Cincinnati, purchased at judicial sale by appellees, of which complainants are the owners as trustees. The case in which the sale took place was that of *Meyer Guggenheim* v. *Moritz Loth and others*, including the appellants, brought in the Court of Common Pleas of Hamilton county, Ohio. The title of the appellants to the real estate in question purported to be conveyed by the master commissioner in that action to the appellees. By the fraud of one Charles A. Kebler, then an attorney of Cincinnati, the appearance of appellants was entered in that action, and a decree was taken selling the lands free of all rights of the appellants, which the decree purported to transfer to the proceeds of sale. The proceeds were taken down by Kebler, and, needless to say, he

appropriated the money to his own use, and never accounted therefor. Kebler had no authority, nor semblance of authority, to do any of the acts he did, purporting to be on behalf of appellants. The appellants were in total ignorance of the spoliations of Kebler until after his suicide, which occurred some eight months after the occurrences above stated. The means by which Kebler attempted to enter appearance of the appellants in the Gugenheim case was by writing on the summons issued for them the following:

"We accept summons in the within cause for Charles E. Strong and James Hampden Robb, trustees, and for William Stix, this 19th November, 1885.

KEBLER & ROELKER,
Attorneys for above named Defendants,
duly authorized thereto."

[See page 29 of Record.]

Kebler & Roelker is the name of the law firm of which Kebler was then a member. Under the laws of Ohio, an officer having a summons in action to serve may accept appearance of the parties named by their acknowledgment of service in writing, in lieu of service. This acceptance of service was in the handwriting of Kebler. William Stix, one of the appellees here, was also a party defendant in the Gugenheim case. He was represented in that case by Kebler, who was his duly authorized attorney. The decree for sale was made on the answer and cross-petition of said William Stix, prepared and filed by Kebler, who likewise drew the decree for sale. This decree purports to be a consent decree as far as it concerns appellees. [See Record, page 37. That part of the decree affecting appellees is found at page 41, printed Record, marginal page 76.]

In this suit, the depositions of appellants were taken to prove want of authority of Kebler to enter their appearance

and to consent to such a decree. These depositions are found at pages 121 and 124 of the Record. It was important to show, also, the nature of the trust under which appellants held the property sought to be reclaimed. In taking the deposition of Mr. Robb, he was shown the deed conveying the premises, the subject of this suit, to himself and Mr. Strong, as trustees, being a deed from Moritz Loth to James Hampden Robb. [This deed is shown at page 49 of Record.] After stating that he was the grantee in this deed, the following question was asked him: "Please state whether or not you are the same James Hampden Robb named as grantee in this deed from Moritz Loth to James Hampden Robb and others?"

[See Record, page 124, at the bottom.]

Then follows this statement:

[Paper shown witness and marked Exhibit "A."]

This paper, Exhibit "A," shows the settlements under which the grantees in the deed last mentioned hold the property, the subjects of this suit, in trust, and the names of the *cestuis que trustent*. It was part of the deposition, and is marked as such by the officer who took the deposition. This paper is in the original files of this case in the clerk's office at Cincinnati, and was placed there with the deposition when it was filed.

The questions and answers put this same witness [see p. 125 of the Record] show that the original summons, with Kebler's fraudulent indorsement thereon; the original answer and cross-petition which he manufactured, swore to, and filed for these appellants in the Gugenheim case, containing as it did his sworn answers, purporting to be *their* answers by himself, as their attorney, to divers interrogatories addressed to them by the plaintiff in the case; the original of the consent decree and other original papers in that case, which purported to affect the appellant's rights as trustee, were shown the witness Robb, who denied all knowledge of

them, and testified to Kebler's entire want of authority. These last mentioned papers are Exhibits "B," "C," "D," "E," and "F" to the depositions of Robb. These papers were also shown to Mr. Strong, the other appellant, when his deposition was taken, and his answers are the same as those given by Mr. Robb, his co-trustee. [See Record, p. 122; marginal, p. 224.]

All these papers are likewise marked by the officer who took the deposition, as exhibits, and bear his initials. They were filed in this case at the same time the depositions were filed. They were offered in evidence with the depositions of Mr. Robb and Mr. Strong. By some oversight they were omitted from the transcript when it was made up by the clerk. This may be accounted for, perhaps, by the fact that these exhibits were not physically attached to the depositions, and were thus overlooked. However that may be, the importance of them to the case of appellants can be readily seen. The omission of these exhibits was not noticed by counsel until he had begun the preparation of the brief for the appellants. As the clerk of the United States Circuit Court for the Southern District of Ohio has had much experience, and is painstaking, it is not deemed necessary by the profession in Cincinnati to go over his transcripts to see that nothing is omitted, when a transcript is delivered by him to counsel in pursuance of directions to make a full record, which were the directions given him in this case.

We humbly ask that a *certiorari* returnable forthwith issue in this cause to bring up the omitted parts of the record specified in the motion. We make this application with the more confidence because it is acquiesced in by counsel for both appellees, as will be seen by their written consent on file, that the writ issue. Counsel of appellees desire to have a certain paper, referred to in the amended answer of William Stix, also made part of this record, and hence their concurrence. [See page 107.] We refer to the case of *Morgan* v.

Curtenius, 19 How., page 8, where this court, *sua sponte*, directed a writ of *certiorari* to issue where the bill of exceptions showed that a certificate of the register of the land office had been offered in evidence, and which the bill also showed was intended to be inserted in it, but which had been omitted.

In *Clark* v. *Hackett*, 1 Black, 77, it is held that the court will award the writ, even at the third term, if the delay be accounted for. We refer further to *Stearns* v. *United States*, 4 Wall., page 1, and *Sweeney* v. *Lomme*, 22 Wall., paragraph 6, bottom of page 214. In this last case the writ was awarded after the cause had been argued. We trust we have sufficiently accounted for not making this application at the first term. The record was printed recently, and the defect was not until then observed. We ask no delay in the case, and if the writ be granted the omitted parts of the Record can be printed before the case is reached for argument. All of which we respectfully submit.

EDWARD COLSTON,
Counsel for Complainants.

Cincinnati, Dec. 26, 1893.

ASSIGNMENT OF ERRORS.

The errors relied upon are:

1. The dismissal of the bill.

2. The relief granted in the cross-bill of Vos.

3. The ruling of the court that Robb and Strong, trustees, ratified the acts of Kebler.

Robert Clarke & Co., Printers.] [January, 1894.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893. TERM NO. 252.

James Hampden Robb and Charles E. Strong, Trustees,

Appellants,

vs.

August Vos and William Stix,

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This is an appeal from the Circuit Court of the United States for the Southern District of Ohio.

The complainants in that court are the appellants in this.

This suit was brought by Robb and Strong, as trustees, to set aside certain deeds made to August Vos and William Stix by a master commissioner of the Court of Common Pleas of Hamilton county, Ohio, in an action there pending known as the *Gugenheim case*, the nature of which will be more fully explained later. The property which these deeds purported to convey is situated on Vine street, in Cincinnati, Ohio, and was bought by Vos and Stix at the sale made in that case.

The ground upon which these deeds are asked to be canceled is that the property they purport to convey being

owned by Robb and Strong, as trustees for Ellen W. Robb, Mary Robb, Mary R. Miltenberger, Charlotte M. Pancoast, and James Hampden Robb, was sold in the *Gugenheim case* free of the title of said trustees *without any service of process of any kind being made upon Robb and Strong, or upon any of the cestuis que trustent, and without any knowledge on their part that such a suit was pending.* The sale took place April 16, 1887, and the master's deed to Vos and Stix conveying the property was made May 24, 1887. Not until the latter part of the following November did Robb and Strong, both of whom were residents of New York City and prominent men, have any knowledge of what had occurred. It only came to their knowledge then by developments ensuing upon the suicide, on November 23, 1887, of Charles A. Kebler, a member of the Hamilton county bar.

This Mr. Kebler was a member of a law firm of Kebler & Roelker, composed of himself and Frederick G. Roelker; which firm, however, was changed in name to that of Kebler, Roelker & Jelke, May 10, 1887, by the admission of Mr. Jelke.

Charles A. Kebler, using his then firm name, entered the appearance of Robb and Strong, as trustees in the *Gugenheim case*, November 19, 1885, by accepting service of summons; and by filing an answer and cross-petition for them, which he swore to; and by also answering, under oath, for Robb and Strong certain interrogatories addressed to them by the plaintiff in the case, which oath, by the law of Ohio, no one can make except the party himself. Section 5099 Rev. Stats. of Ohio, provides that such interrogatories, if not demurred to, shall be plainly and fully answered under oath by the *party* to whom they are propounded. Kebler then consented to a decree that the property be sold free of the title of Robb and Strong, trustees, and that their rights be transferred to the proceeds of sale, which proceeds were afterward paid over to Kebler as attorney for Robb and

Strong, trustees, and were by him embezzled, along with much other money. When concealment was no longer possible, he took his own life. Then for the first time Robb and Strong learned of the fate of their trust property and the means by which its loss had been compassed. It will be necessary to go a little more into detail.

By a deed dated February 5, 1885, the property was conveyed by one Moritz Loth and wife to James Hampden Robb and Charles E. Strong, appellants, as trustees. On the same day, by a deed of indenture, James Hampden Robb and Charles E. Strong, as trustees, leased the property to said Moritz Loth for and during the lifetime of Ellen W. Robb and Mary Robb, and of the survivor.

The lessee, for himself and assigns, covenanted with Robb and Strong as trustees, to pay during the term an annual rent of $600 in equal semi-annual installments; to pay all taxes, assessments, and charges levied or assessed during the term; to keep the premises insured during the term; and to purchase the property at $10,000 upon determination of the life estate. A lien was reserved upon the life estate for the performance of these covenants. Moritz Loth, the lessee, conveyed March 30, 1885, to William Stix, one of the appellees, by way of mortgage to secure a loan of ten thousand dollars, these leasehold premises, together with other property more or less incumbered. Moritz Loth was largely indebted to divers persons, firms, and corporations, and although the owner of much other real estate, it was all incumbered in a greater or less degree. Meyer Gugenheim, a judgment creditor of Loth, brought an action in the Court of Common Pleas of Hamilton county, Ohio, to subject all the real estate of Loth to satisfaction of his judgment. (Record, p. 17.) To that suit he made parties defendant a number of creditors of Loth who held title to or liens upon property claimed to be his. Robb and Strong, trustees, were of the number so made parties, as was also William Stix, one

of the appellees. That suit was begun November 11, 1885. A summons in that action was issued for Robb and Strong, trustees, and also for William Stix, as well as for the other defendants. On the 19th day of November, 1885, Kebler accepted service of that summons for Robb and Strong, trustees, and for William Stix, as follows:

"We accept service of summons in the within cause for Charles E. Strong and James Hampden Robb, trustees, and for William Stix, this 19th November, 1885.

"KEBLER & ROELKER,

"*Attorneys for above-named defendants, duly authorized.*"

Kebler's authority to appear for William Stix is not questioned. The petition described various parcels of real estate claimed to be the property of Loth, and asked that the several defendants be required to show what interest they respectively had therein, and that the liens be marshaled and priorities determined, and a sale be made. As to the parcels owned by Robb and Strong as trustees, the petition averred that they held the property only as security, and asked that the court so find. As bearing on this averment, interrogatories were attached to the petition, requiring Robb and Strong, trustees, to state what sum of money was paid to Loth as the consideration of the conveyance to them; what indebtedness existed at the time of the conveyance in reference to said property; whether any contract existed between them and Loth in reference to the property, etc. (Record, p. 27.)

The sheriff returned the summons: "Service accepted by Kebler & Roelker, attorneys for Charles E. Strong and James Hampden Robb, trustees, and for William Stix, as per acceptance above written." (Record, p. 29.) On December 18, 1885, Kebler filed the answer and cross-petition of Robb and Strong, trustees, correctly setting forth their title to the

premises, and prayed that their interest be protected therein. (Record, p. 30.) He answered under oath the interrogatories as attorney for Robb and Strong, trustees, assigning as a reason therefor that they were non-residents of the state and absent therefrom.

Kebler also filed in the same case the answer and cross-petition of said William Stix (Record, p. 33), and at a later stage of the case he filed an amended answer and cross-petition of William Stix setting up the maturity of several of the mortgage notes, breach of condition of the mortgage, and prayed a sale of the leasehold in the premises now in controversy, and of other property mentioned in that cross-petition. To these pleadings of Stix, Kebler filed answers for Robb and Strong, trustees, which he himself swore to. (Record, 36.)

In Ohio a *pleading* may be verified by attorney when the party is a non-resident. Rev. Stat. Ohio, § 5109.

Kebler from this point on seems to have taken command of the case, for on February 15, 1887, he entered an elaborate decree on the cross-petition of William Stix, selling all the property described in the petition and appointing George Sidney Tyler master commissioner to make the sale. (Record, p. 37.) Tyler, by the way, was in Kebler's office. That part of the decree which lost to Robb and Strong, trustees, this property was as follows:

"And it is ordered *with the consent* of Henry W. Taylor, and Charles E. Strong, and James Hampden Robb, trustees, that the fee-simple title of the premises described in said mortgage to William Stix *be sold and said premises sold freed from the claims of* Henry W. Taylor, and Charles E. Strong, and James Hampden Robb, trustees, and all other parties in this suit, their respective rights in and to said premises *being transferred to and reserved in the proceeds of such sale.*" (Record, p. 41.)

This was the crime of the case. But for this false con-

sent, the trust title which had been properly placed before the court would not have been displaced by its decree.

The prayer of the present bill is to have this sale declared void, and have these deeds set aside and declared null, and that Vos and Stix the purchasers, be enjoined from asserting any title in or to the premises adverse to the title of complainants, and that complainants *be restored to all rights in said premises they had or were entitled to have before and at the time the Gugenheim suit was begun*, by virtue of the conveyance to them in trust and of their lease to Loth, and that the incumbrance and claim upon their title created by the sale and deeds aforesaid be annulled and complainants declared to be the sole owners in fee simple of all the said premises as trustees, subject only to the lease for life, and that said lease be declared to be in full force and effect, and binding on Vos and Stix, as assignees of Loth, and be enforced against them as such. And that they be required to specifically perform the covenants of the lease providing for insurance of the premises, and that they be declared to have a lien on the leasehold estate for all past due rent, and that said estate be sold to pay the same, and for all other relief. The bill was dismissed on the ground that the complainants had by conduct ratified these unauthorized acts of Kebler.

ARGUMENT.

The demurrer of August Vos to the Bill raises two questions:

1. Can the decree rendered in the *Gugenheim case* divest appellants of their title to the land, inasmuch as they were never served with process in that cause, their appearance and the decree having been entered without their authority or knowledge.

2. If for this reason that decree and the deeds to Vos and Stix be invalid, is the remedy in equity?

The cases clearly establish that, where an attorney, without authority, enters the appearance of a defendant who has not been served in the case, any judgment rendered therein against him is a nullity. It was once otherwise in England. The only remedy of the defendant in such a case would by the ancient common law have been an action against the attorney, unless he was "not responsible or suspicious," but that rule gradually underwent change.

In *Bayley* v. *Buckland*, 1 W. H. & G. p. 1, Rolfe, B., said:

"Non-responsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may notwithstanding be ruined. It is true that the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and the possible loss of costs." (p. 6.)

That court further said: "On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so." They set aside the plaintiff's judgment.

That case was very fully considered and the prior cases called to the attention of the court. The true view is stated by this court in *Shelton* v. *Tiffin*, 6 Howard, 163. In that case Mosely and Bouldin, citizens of Virginia, brought a suit in the United States Circuit Court in Louisiana against John M. Perry, a citizen of Louisiana, and Lilburn P. Perry, a citizen of Missouri. The former was served with process in the action; the latter not. Mr. Crawford, a regularly ad-

mitted attorney of the court, employed by John M. Perry, filed an answer for both Perrys, but was not authorized to do so by Lilburn P. Perry. His filing an answer for Lilburn P. Perry was by mere inadvertence, according to his evidence; wherein we may say it would differ from the conduct of Kebler in this case, which was clearly an intentional fraud, at least so far as the *consent* decree was concerned. Plaintiffs Mosely and Bouldin were entirely innocent of any knowledge of want of authority on the part of Mr. Crawford. Execution was issued, and a certain debt due to Lilburn P. Perry from one Anderson, evidenced by his three promissory notes secured by mortgage, was seized and sold upon execution. They were bought by said Anderson, who paid $5,000 therefor in cash. By this purchase the notes became extinguished and the mortgage satisfied, as Anderson claimed. Later, suit was brought in the United States Court in equity for relief against that judgment and the sheriff's sale, and to foreclose the mortgage. The court held that the proper remedy was in equity, and not necessarily at law, and that the evidence of Mr. Crawford that he had no authority from Lilburn P. Perry to appear for him was sufficient to invalidate the judgment.

The court said:

"An appearance by counsel under such circumstances to the prejudice of a party subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property." (See p. 186.)

The testimony of Mr. Crawford as to his supposed authority is found at page 178. It was, in brief, that he had received a letter from John M. Perry informing him that there was upon the records of the court a suit begun against

him and others by Mosely and Bouldin, and that he wished to employ him to defend it. John M. Perry had been known to attend to the affairs of Lilburn P. Perry, but had no special authority in this matter. Presuming that this letter warranted him in appearing for both defendants, Mr. Crawford acted as has been stated.

A demurrer was filed to the bill in that case on the ground that the complainants had plain and adequate relief at law. To this the court said:

"The demurrer is clearly unsustainable. Fraud is alleged in the bill, and relief prayed against a judgment and a judicial sale of the property in controversy. These and other matters stated in the bill show that, if the complainants shall be entitled to relief, a court of equity only can give it." (See p. 185, bottom.)

This case is regarded as a leading authority on the subject. It has been followed in a very able opinion by Dillon, C.J., in *Harshey* v. *Blackmarr*, 20 Ia. 161.

Also in *DeLouis* v. *Meek*, 2 G. Greene (Ia.), 71, where it is held that the proper remedy for setting aside a judgment procured on an unauthorized appearance of an attorney is by a bill in equity. And in that case the demurrer to the bill was overruled.

Also,

Powell v. *Spaulding*, 3 Id., at p. 458.
Ridge v. *Alter*, 14 La. An. 866.
Truett v. *Wainwright*, 9 Ill. 418.

We also refer to a very able article written by Judge Dillon on the subject, entitled "Attorney and Client," published in 5 Am. Law Register (N. S.), 385.

In *Harshey* v. *Blackmarr*, *supra*, the plaintiff held a mortgage upon the property of the defendant. One Hasty was the holder of a mortgage upon the same property prior in date, but which had not been recorded until after the mortgage of the plaintiff was recorded. Hasty brought an action

upon his mortgrge for a foreclosure, making the present plaintiff a party. The present plaintiff was not in that action served with process, nor did he know of the case, but his appearance purported to have been entered by an attorney, J. W. Hambleton, filing an answer for him. A decree was taken selling the land and making the mortgage of Hasty a prior lien to that of the present plaintiff, while in truth and in fact the reverse was the case; and the land was sold under such decree, and one Parnell became the purchaser and received a deed therefor and entered into possession.

Thereafter, Harshey brought a suit against the original mortgagor; against Hasty, and Parnell, the purchaser; asking that the sale be declared void and the deeds made thereunder to the purchaser set aside, and that the said property be resold to satisfy his mortgage. In his petition, he averred that he made no appearance in the foreclosure suit brought by Hasty, either by attorney or otherwise, and that one Hambleton, who purported to appear for him, had no authority therefor; that in fact Hambleton did not pretend to appear for plaintiff, but that the attorney for Hasty in the foreclosure suit, fraudulently designing to foreclose and deprive the plaintiff of his lien upon the land, wrongfully and falsely wrote what purported to be his answer, and signed thereto the name of Hambleton as attorney.

The court below decided the case on demurrer against the plaintiff, upon the ground that plaintiff's only remedy was against Hasty or his attorney or Hambleton; that he could get no relief against the purchaser of the property. From that decree there was an appeal to the Supreme Court, which reversed the judgment below. In the course of an elaborate opinion, the court, among other things, said:

"Although an attorney can not, without special authority, admit service of *jurisdictional process* upon his client, yet it will be presumed in all collateral proceedings, and perhaps

on appeal or in error, that a regular attorney at law who appeared for a defendant, though not served, had authority to do so." (See p. 171.)

For that reason, the learned judge shows that it devolved upon the party who had been represented by an unauthorized attorney to negative the presumption of authority, which could not be done by an appeal or a writ of error. Hence the necessity for relief either by motion or bill in equity. His conclusion on that feature of the subject is thus stated:

"Certain it is, however, as the authorities hereinafter cited will show, that the party is entitled to relief when an unjust judgment, though a domestic one, has been rendered against him by fraud or collusion, or by the appearance of an unauthorized attorney, if the party seeks the relief by bill or motion promptly, and has been guilty of no laches." (p. 173.)

And after stating that no examination of the subject would be complete without reference to the leading cases in England and America, he said:

"And in other States it is now the constant practice, as we have before stated, to relieve parties, sometimes by motion, and sometimes in chancery, from judgments rendered against them in consequence of the totally unauthorized acts of a pragmatical attorney." (See p. 179.)

He then stated the facts, the truth of which was admitted by the demurrer, as follows:

That the plaintiff was a non-resident of the state and had therefore not been personally amenable to its jurisdiction; that he had no notice of the Hasty foreclosure proceeding, and no service, personal or constructive, was made upon him; that the plaintiff in that suit procured an answer to be filed by fraudulent representations and by an attorney who had no right, shadow or color of authority; and that no statement was made that the attorney was insolvent. (p. 181.)

He then says:

"Assuming these to be the facts, it is clear that if there had never been any sale under the Hasty decree, or if Hasty had become the purchaser and were still the owner of the land, the present plaintiff would, according to the principles of law hereinbefore considered, and notwithstanding the recitals in the decree as to jurisdiction, be entitled to relief." (See p. 181.)

And further on he said:

"And this brings us to the more difficult question, whether, assuming these facts, and the further fact that the demurrants in the case at bar are *innocent purchasers* of the land, the plaintiff is entitled to relief against *them*. This obviously involves the further question, whether, on the above facts, the Hasty decree, as against the plaintiff, is utterly *void*, or only *voidable*. . . . It is our opinion that if the facts stated in the petition, and above assumed, are true, the decree, as to the plaintiff, was a *nullity*, and could not be the basis of any valid sale. We see no escape from the conclusion that it is good or bad; binds him or does not bind him; *there is no half way house*." (p. 182.)

Kebler's want of authority in this case is clearly proven, and the *prima facie* presumption of authority is overcome by the evidence of complainants. (Record, pp. 121 to 129.)

It is next claimed that there was a plain, adequate and efficient remedy at law, and that, therefore, the court is without jurisdiction.

We claim that there was no remedy at law as plain, adequate and efficient as that we ask in equity, and that there is jurisdiction. This question is one which depends upon the facts of each case, to a large extent, but we call attention to

some of the decided cases before discussing the facts which entitle us to equitable relief in this case.

In *Boyce's Executors* v. *Grundy*, 3 Peters, 215, this court said:

"It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

In *Watson* v. *Sutherland*, 5 Wal., at p. 78, the above statement that the legal remedy to be adequate must be as plain, as practical, as efficient and as prompt as the remedy in equity, is adopted and applied to a case where a creditor of A. undertook to levy upon a stock of goods in possession of B., on the ground that they had been transferred in fraud of creditors. But the court, upon being satisfied that the conveyance was not in fraud, enjoined the levy of the execution although there was the remedy at law for damages in case the goods had been seized.

In *Slater* v. *Maxwell*, 6 Wal. 268, the court, p. 276, said:

"When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale, or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment, whether the deed be the ground upon which the recovery of the premises is sought by the purchaser, or be relied upon to defeat recovery by the owner. In some instances, equity will interpose in cases of this kind, as where the deed is by statute made evidence of title in the purchaser, or the preliminary proceedings are regular upon their face, and extrinsic evidence is required to show their invalidity. *Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief.*" (Italics ours.)

Cocks v. *Izard*, 7 Wal. 559, the court said:

"It is insisted that the complainant should have availed himself of the summary mode, by petition or motion to the court, to have had the sale set aside and resale ordered; but this objection can not prevail. It is needless to inquire whether he could have obtained his object in this way, as by not pursuing it, he did not forfeit his right to sue in equity, and the defendant has surely no right to complain, for he has now ample opportunity to make defense and vindicate his integrity." (See p. 562.)

That was an action where the defendant had bought the land of the plaintiff at a sale under execution issued on a judgment rendered against the complainant by a provisional court of Louisiana, without service of process upon him. After the reversal of the case by this court in the decision last referred to, Izard seems to have sold the land to one Lewis, against whom Cocks brought the case of *Lewis* v. *Cocks*, 23 Wal. 466. Fraud on the part of Izard in making the purchase having been effectually disposed of by the evidence in the court below, this court decided that the only remaining ground for relief being the nullity of the judgment of the state court, presented no equitable feature, and that the remedy should be by ejectment.

In *Oelrichs* v. *Spain*, 15 Wal., at page 228, the court said:

"Upon looking into the record, it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. . . . The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, *there is an element of trust* in the case, which, wherever it exists, always confers jurisdiction in equity."

In *Morgan* v. *Beloit*, 7 Wal. 613, this court said that a

remedy was neither plain nor adequate where it would involve circuity of litigation. (p. 618.)

In *Pa. R. Co.* v. *St. Louis, etc., R. R.*, 118 U. S., p. 290, a bill in equity having been filed by lessor company against lessee company to enjoin latter from canceling a lease of the railroad and to enforce specific performance of its covenant, Mr. Justice Miller, stating the opinion of the court at page 305, said:

"If the contracts are valid contracts, and the complainant has the rights which are guaranteed to it under them, such relief is very inadequate. To sue for every monthly installment of rent, even if the principal and the guarantors can be sued jointly, is almost equivalent to a denial of justice. If the contract is to continue and the road to be run by the lessee company, which is insolvent, a monthly resort to a suit at law against the guarantors is destructive of the substantial right of the plaintiff under the contract. Having a valuable contract in regard to the operation of the road for a great many years to come, plaintiff can not be compelled to forfeit it and resume possession and sue for all its damages in one action, because this would best serve the purpose of the solvent guarantors."

In *Johnson* v. *Waters*, 111 U. S. 640, it was held that a creditor might maintain an independent suit in equity to set aside for fraud a sale of real estate of the decedent made under an order of court, though a party to the proceedings, if he is no party to the fraud, and was ignorant of it until after the confirmation of the sale, and no question about it was before the court which confirmed the sale and passed upon the executor's accounts.

In the present case we had no adequate, plain, practical or prompt legal remedy; none that is the equivalent of what we might have in equity. We could not maintain ejectment because we are not entitled to possession of the lands, they being subject to the life estate. Under the decretal sale, the

interest of Loth in this lease passed to Vos and Stix, and they are the owners of that life estate.

Sutliff v. *Atwood*, 15 Ohio St. 186 (par. 1, of syllabus).

Nor would an action for the recovery of the rent twice a year be an adequate remedy, because Loth, the lessee, is insolvent, and such action against Vos and Stix might be defeated by their transferring the property to a beggar; assignees being liable only during possession. Moreover, suing Stix and Vos would involve a multiplicity of actions and uncertainty in point of result. This rent being intended to provide a living for Mrs. Robb, its prompt payment becomes very essential. None of these actions at law would restore the appellants to their title to the property. They have a right to a reconveyance from Vos and Stix of that title. The prayer of the bill, among other things, is:

"That your orators be restored to all rights in and to said premises they had, or were entitled to have, on the said 13th day of November, 1885, by virtue of their ownership thereof in fee simple as trustees aforesaid, and by virtue of the execution and delivery of said lease."

Then, again, there is the element of fraud in this case, which is always a ground of equitable relief, even *though it be practiced by an attorney in the fraudulent procurement of a false decree.*

As was said in *De Louis* v. *Meek*, 2 G. Greene, at p. 71:

"To prevent injustice of this kind is one of the most efficient and valuable powers of a court of equity."

In *Truett* v. *Wainwright*, 9 Ill. 418, the court said:

"The setting aside of judgments as well in the case where they were procured by the misconduct of the plaintiffs as where they were obtained by the unauthorized appearance of strangers, rests on the ground of fraud, such practices being regarded by courts as fraudulent, whatever might have been the original intentions of the party. It is well settled that

in cases of fraud, chancery has always jurisdiction, though courts of law may exercise it concurrently in all cases in which their powers are sufficient for the relief sought."

It was claimed in the court below, that to grant the relief asked in this bill would be interfering with the jurisdiction of a state court; but this is clearly not so. We content ourselves by referring to the following cases on that subject:

Anderson v. *Smith*, 19 Blatchford, 112.
Stewart v. *C. & O. Canal Co.*, 4 Hughes, 41.
Gilman v. *Perkins*, 7 Fed. Rep. 891.
Elliott v. *Piersol*, 1 Peters, 340.
Shelton v. *Tiffin*, 6 Howard, 163.
Pennoyer v. *Neff*, 95 U. S. 714.
Wightman v. *Karsner*, 20 Ala. 446.

ELECTION, RATIFICATION, THE COPPOCK CASE.

It is claimed that Robb and Strong, trustees, by filing an answer and cross-petition in the case, *William J. Coppock, Adm'r of Chas. A. Kebler*, v. *John Kebler et al.*, case No. 79,812, Court of Common Pleas, Hamilton county, Ohio (afterward consolidated with another case, Record, p. 164), ratified Kebler's want of authority, and thereby made the title of Vos and Stix to the land in question, good. Appellees plead this alleged ratification in separate answers.

See answer of William Stix, p. 64; answer of August Vos, p. 77; answer and cross-petition of Robb and Strong, which is claimed to operate as a ratification; (Exhibit to the original answer of Stix, p. 65, Record.)

William Stix filed an amended answer (p. 77, Record), wherein he made no material averment differing from those in the original answer, except that in the amended answer he alleges that the appearance of Robb and Strong in the *Gugenheim case* was entered by Charles A. Kebler, whereas in his original answer he averred that the appearance was entered by the firm, Kebler & Roelker.

A general replication was filed to the answer of William Stix and also to the answer of August Vos. No replication, however, was filed to the amended answer, but we take it none was needed, and that the replication to the original, operates as a denial of the averments of the amended, answer.

Humes v. *Scruggs*, 94 U. S. 22.
Fretz v. *Stover*, 22 Wal. 198.

Ratification being thus asserted and denied, the question is, whether the mere fact that Robb and Strong, trustees, filed an answer and cross-petition in the Coppock case furnishes, *under the circumstances*, conclusive evidence that they did thereby elect to abandon their title, as trustees, to this land, and to adopt in lieu thereof the chance of recovering some or it may be all or it may be none of the money from Kebler's assets or from Kebler's partners *by means of the Coppock case*. The court below decided in the affirmative and accordingly dismissed the bill on that ground. (Record, p. 175.)

We claim that there is in this record no evidence of an intelligent and intentional ratification of the acts of Kebler and of deliberate choice *actually made* to look solely to what might be gotten out of the Coppock case. It is not pretended that there was any express ratification, and, therefore, if any ratification there was, it must be implied. This presents a question of fact, not of law. Ratification and election rest upon intention. The answer and cross-petition of Robb and Strong, which is claimed to operate as a ratification, was not a *suit begun* by them, but only a pleading filed in an action in which they had been summoned as defendants, *for a limited purpose*, by the cross-petition of Frederick G. Roelker. Roelker did not claim it was necessary to bring in Robb and Strong, trustees, in order to determine the question whether they had any claim upon "the subject-matter in this case." The precise language of Roelker's cross-petition is that Robb

and Strong, trustees, "are necessary parties to the determination of the right of *plaintiff* (Coppock), and of this *defendant* (Roelker), to the subject-matter of the litigation in this cause." (Record, mar. p. 304.)

Roelker did not aver that Robb and Strong, trustees, had any claim to participate in his indemnity fund or that they had asserted a right to avail themselves thereof. He recognized no rights of Robb and Strong in that fund nor to any relief in the case. Their presence was averred to be necessary only to determine rights between Coppock and him. Roelker acted on the idea that it was necessary to have Robb and Strong before the court to enable *him* to establish *his* lien upon the Kebler assets to an extent that would protect him against the Robb and Strong claim should they make it, and not in order to afford *them* an opportunity to assert any right of *theirs*. But, in reality, their presence was not necessary even for his purpose; and the court so decided, and they were dismissed. It is true that Robb and Strong, in their answer, overlooking the purpose for which they had been invoked into the case, did set up a claim to personal judgment not only against Roelker, but against Jelke, the other partner, whom the answer of Robb and Strong prayed should be made a party. But Jelke was not made a party. It was, however, clearly not a case for a personal judgment against Roelker and Jelke or either. Such cause of action would have been foreign to the case as affecting some and not all the parties to the cause, and would have been contrary to the provisions of § 5020 Revised Statutes of Ohio, which requires that each cause of action shall affect all the parties to a case. It was proper, then, for these reasons, if for no other, that Robb and Strong should withdraw their answer and cross-petition, it being subject at any time before trial to be stricken from the files for non-conformity to that section or to a demurrer for the same reason. The result is the same as if no such answer had ever been filed by them.

But if any effect is to be given to the filing of this answer and cross-petition, no greater effect can be rightly claimed for it than would attach to it as the presentation of a claim to participate in a fund, the value of which the claimant knows nothing of; for any thing more would have exceeded the limits of that case. The presentation of such a claim would not amount to an election even where it is filed *voluntarily*. So are all the authorities, particularly *Morris* v. *Robinson*, 3 B. & C. 196; *Curtis* v. *Williamson*, L. R. (10 Q. B.) 57; *Wells* v. *Robinson*, 13 Cal. 133. But the appearance of Robb and Strong in the Coppock case was not voluntary. Robb and Strong, although non-residents, were subject to constructive service by publication, and being thus compellable to appear, their appearance without waiting to be served by publication would have no different effect than if they had been served in that manner.

Service may be had by publication in either of the following cases:

"In actions which relate to, or the subject of which is, real or personal property in this state, when the defendant has or claims a lien thereon or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence can not be ascertained."

(Revised Statutes of Ohio, sec. 5048, paragraph 4.)

At least the filing of the answer and cross-petition was governed by that belief of his counsel.

The history of the Coppock case is as follows:

Coppock, as administrator of Charles A. Kebler, filed a petition in the Court of Common Pleas of Hamilton county, Ohio, Case No. 79,812, for authority to sell the real estate of Kebler to pay his debts, which, the petition alleged, amounted to over $150,000; and it also alleged that his personal property amounted to only $30,000. By the laws of Ohio, the personal property of a decedent constitutes the primary fund

for the payment of debts, but when that fund proves insufficient, it is the duty of the administrator to apply to the Probate Court or Court of Common Pleas for authority to sell the real estate. (Revised Statutes of Ohio, sec. 6136.)

Section 6137 (Id.) provides that to obtain such authority, the administrator shall commence a civil action. Section 6141 prescribes what such petition shall contain. Section 6142 prescribes who shall be the necessary parties to such suit, viz., the widow and those having the next estate of inheritance, and all *mortgagees and other lien-holders*, whether by judgment or otherwise, of any of the lands sought to be sold. Section 6143 provides for making service on defendants in the same manner as in other *civil actions*.

Frederick G. Roelker was made one of the defendants to that petition, upon the allegation therein that he held a mortgage on the land sought to be sold, "given to secure certain indebtedness owing by said Charles A. Kebler to Frederick G. Roelker." (See p. 159 of Record, marginal page 296.) He was one of those "required to answer and set forth their respective claims." (See p. 159 of the Record, marginal page 296.) He filed his answer (see Record, p. 161), in which he set up an indebtedness of Charles A. Kebler to him, amounting to over $13,000, evidenced by two promissory notes, and further set up a mortgage upon part of the premises described in the petition, to secure the payment of that sum. He also alleged that the mortgage as well as certain other property was security for any further indebtedness which, upon a settlement of the accounts and business of the partnership of Kebler and Roelker, the said Kebler might owe him, and to indemnify him against any loss that he might sustain or liability that he might be under by reason of the business of that partnership. (See Record, p. 163, marginal page 303.) This answer contained the further allegation that certain other parties, naming them, and "John Hampden Robb and Robert F. Strong" (meaning Charles E. Strong), "trustees, claim to have had dealings with the said Charles

A. Kebler, acting and professing to act as the partner of this defendant, whereby the said parties claim that the said partnership and this defendant became indebted to them and each of them, and this defendant says that he does not know and is unable to state the particulars of said transactions; that they were and each of them concealed from this defendant by the said Charles A. Kebler, in his lifetime, and this defendant had no knowledge thereof until the death of said Charles A. Kebler; and this defendant states that *if* there is any liability in said partnership, in the practice of the law and of this defendant by reason of his being a member of said partnership to the said parties above named or to either of them, that said liability of this defendant is covered, and this defendant is thereby indemnified against the same by said assignment and transfer of said bonds and the conveyance of said real estate on the 23d day of June, 1887, as herein before set forth, and this defendant says that said . . . . and said James Hampden Robb and Robert F. Strong, as trustees, and . . . are necessary parties to *the determination of the right of plaintiff* and of *this* defendant in the *subject-matter* of the litigation in this case, and this defendant prays they may be made defendants herein, and be required to answer and set up their claim, if any they have, against this defendant, by reason of any transactions that the said Charles A. Kebler, acting or professing to act as the partner of this defendant, and this defendant prays that upon the sale of the property described in plaintiff's petition in which it may be found that the said Charles A. Kebler had any interest as owner or otherwise, that the right of *this* defendant may be protected by the court *in the distribution of the proceeds of sale*, and for all other and proper relief." (Record, marginal page 304. Italics ours.) Not a word said about the protection of Robb and Strong!

Supposing, however, they were proper parties and that the case was one within the provision of section 5048, Revised Stat-

utes of Ohio, paragraph 4, providing for service by publication, Robb and Strong, as trustees, filed on March 2, 1888, the answer and cross-petition found at page 65 of this Record. The Coppock case was afterward consolidated with another suit in the same court, brought by the same administrator, against Samuel Kuhn and others (No. 79,902) to enable him to administer the *personal* estate of Kebler. (Record, p. 164.) Finding the personal property of Kebler, consisting of some bonds and other security intermixed and confused with the property of others, the administrator was compelled to invoke the aid of the court to enable him to ascertain which of these belonged to the estate of decedent.

The counsel of Robb and Strong, upon further consideration, realized that Robb and Strong were not proper parties to the Coppock case, and on the 16th day of May, 1888, by leave of court, withdrew their answer and cross-petition, and filed a demurrer on the ground that they were not proper parties. This demurrer was sustained, and Robb and Strong were dismissed, with their costs, from the case, on the 26th day of the same month. On the 31st day of that month they filed the present bill. (See Record, pp. 165 and 166.)

We claim that the filing of this answer and cross-petition of Robb and Strong, trustees, upon a misconception, and in a mistaken belief that they *were bound to answer in that case*, can not, in view of the fact that they never had any standing in the action and had no right to be heard, and that there could be no adjudication therein for them, operate as a bar to the relief they now ask. How can the appellees distort to their advantage the mere *fortuitous* circumstance that such answer and cross-petition was thus placed upon the files? Any attempt to prosecute their cross-petition would have been utterly futile and ineffectual, as much so as if the court had had no jurisdiction of the subject. It was no choice of remedies on their part, because no remedy was open to them in

that case. The portals of that court were barred against them had they wanted to remain.

It is also to be borne in mind, that no prejudice has resulted to the appellees by filing the answer and cross-petition of Robb and Strong. Nearly a year before the filing of that answer and cross-petition, Vos and Stix had made their purchase of this property, paid the purchase price, and had entered into possession. (Record, p. 144, the evidence of August Vos.) It is not a case, therefore, where any equitable consideration in the nature of estoppel arises. Nor is it a case where Robb and Strong were under any obligation from the circumstances to make election whether they would avow or disavow the acts of Kebler, the case not being one where any loss could have or did ensue from the delay on the part of Robb and Strong in bringing this suit, incident to the pendency of the answer and cross-petition; nor one where the transaction might turn out a profit or loss to them according to circumstances.

Our claim that there was no election on the part of Robb and Strong to ratify the acts of Kebler in consenting to the sale of the property as professed attorney for Robb and Strong, trustees, is placed upon the following grounds: *First.* Robb and Strong, trustees, had no authority or power to ratify a transaction, the effect of which would be to divest them of their title as trustees to this property. They could not have conveyed this property in the first instance so as to divest their *cestuis que trustent* of their title; and *a fortiori* could not do so by ratification after the property had been sold and the proceeds thereof squandered. Stix and Vos derived notice of this want of power on the part of Robb and Strong from the conveyances and from the pleadings in the case. Robb and Strong had no power to have accepted in lieu of the land the *chance* of making the money out of the

insolvent Kebler, or out of his solvent partners who denied responsibility for his acts.

A ratification can only be made when the party ratifying possesses the power to perform the act ratified.

Marsh v. *Fulton*, 10 Wal., at p. 684.

Second. There could be no ratification as against the partners of Kebler without their consent; they did not consent to a ratification the result of which would have made them liable for stolen money. The claim in the answer and cross-petition of Robb and Strong was *not* against the estate of Kebler alone, but only against his partners; or at most against Kebler, in conjunction with them.

Third. Ratification being a question of intention, the filing of the answer and cross-petition of Robb and Strong did not under the circumstances constitute an election to give up the land and accept in lieu thereof a *supposed* right of recovery, for which they had in that case no remedy *enforceable in that proceeding.*

The nature of the title and of the trust upon which Robb and Strong held this property is as follows:

James Robb died, a citizen of Cheviot, Hamilton county, Ohio, leaving considerable estate, and James Hampden Robb, Mary R. Miltenberger and Charlotte M. Pancoast as his surviving children and distributees of his estate then in the hands of Charles A. Kebler, his administrator. In order to settle certain claims of Mrs. Miltenberger and Ellen W. Robb, as cerditors of the estate of James Robb, a paper was executed by the parties above named, which provided, among other things, in article 4, as follows:

"And after paying the same, the remaining money in his hands and the proceeds of the sale of the land aforesaid or

so much as necessary shall be set apart and *invested* for two trust funds as follows: one of the said funds shall be made sufficient to pay Mrs. Miltenberger the amount already due of said annuity in compliance with the agreement made with her father for account of her son's education, and also to yield and pay the said annuity year by year until her son becomes twenty-one years of age if he lives, and the surplus of said fund, if any, remaining after he becomes of age, or in case he dies before becoming of age shall fall into the residuary estate to be divided as hereinafter agreed; the other of the said funds to be sufficient to secure and pay Mrs. Ellen W. Robb an annuity of $600, for and during the term of her life, payable semi-annually, and to commence from the day of ——, A. D. ——, and from and after her decease, to pay the said Mary Robb her daughter, if she survives her mother, an annuity of $300, payable semi-annually for and during the term of the life of the said Mary, and that the annuities so to be paid to the said Mary R. Miltenberger, Ellen W. Robb, and Mary Robb, respectively, shall be in full satisfaction and discharge of all their claims aforesaid as creditors of the said estate. The appointment of trustees and appropriation of funds necessary and sufficient for the two trusts aforesaid, shall be effected as soon as practicable by the said Charles A. Kebler, the administrator, and the parties concerned."

[Exhibit A. to deposition of Robb, Record p. 135. See the Exhibit in Stipulated Record.]

To carry out the settlement therein provided for, $10,000 of the money in the hands of the administrator was laid out by Robb and Strong, trustees, in the purchase of the property in question, the title being conveyed to Robb and Strong as trustees by deed of date February 5, 1885. (Exhibit 5, Record p. 49.) This deed recited a consideration of $10,000 as paid to the grantors by Robb and Strong, *trustees*. On the same day, February 5, 1885, Robb and Strong as trustees

leased the same property to one Moritz Loth, during the joint life of Ellen W. Robb and Mary Robb and during the life of the survivor, lessee paying rent of $600 per annum, semi-annually, to lessors as trustees, with an obligation of lessee to purchase the property at $10,000 upon the death of the *cestuis que vivent*. This lease described the property as being "*all of said lots heretofore conveyed by said Moritz Loth to said James Hampden Robb and Charles E. Strong, trustees*, by deed dated February 5, 1885. (Exhibit C, Record p. 51.)

James Hampden Robb testified that this deed and lease were executed in pursuance of the written agreement, Exhibit A (Record, p. 124, bottom). When August Vos and William Stix purchased these premises at judicial sale, they had notice of this trust upon which Robb and Strong held this real estate, and of the two conveyances, the one to Robb and Strong, *trustees*, and the other, the lease of it, by Robb and Strong as *trustees*. Both conveyances were duly recorded in the recorder's office of Hamilton county, Ohio, on February 17, 1885. (Exhibit D, p. 154 of the Record.) It is true that this deed did not declare on its face the nature of the trust, but it showed that the consideration was paid by the trustees, and the lease of the same premises on the same day described them as the same conveyed previously by lessee to Robb and Strong, *trustees*. The word "trustee" was full notice of the nature of the trust.

In *Shaw* v. *Spencer*, 100 Mass. 382, the court said:

"Unless the word trustee may be regarded as being mere *descriptio personæ*, and rejected as a nullity, there was plain and actual notice of a trust of some description. A trust as to personalty or choses in action need not be expressed in writing, but may be established by parol. That the mere use of the word 'trustee' in an assignment of a mortgage and note imports the existence of a trust, and gives notice thereof to all into whose hands the instrument comes, has been expressly decided by this court. *Sturtevant* v. *Jacques*,

14 Allen, 523. See also *Bancroft* v. *Consen*, 13 Allen, 50; *Trull* v. *Trull*, Ib. 407. It is insisted on behalf of the defendants, that even if there was actual notice of the existence of a trust, there was no notice of its character, and that the trust might have been *such as to authorize the transfer which was made by Carter*. But, in our opinion, the simple answer to this position is, that where one, known to be a trustee, is found pledging that which is known to be trust property, to secure a debt due from a firm of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such a security to ascertain whether the trustee has a right to give it. A pledge of corporate stock held in trust as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by 'A. B., trustee for C. D.,' but *the effect of the word* 'trustee' is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word 'trustee' alone has no meaning or legal effect."

If it is the duty of one taking property known to be trust property as security for a firm debt, to ascertain whether the trustee had the right of pledge, is it not equally the duty of one who buys of trustees a remainder in fee of real estate known to be held in trust by them, to ascertain their right to sell? They must be supposed to hold for some purpose. Was it for purposes of sale or for purposes of per-

manent investment to raise income? The purchaser who closes his eyes to such inquiry takes the chances.

Smith v. *Ayer*, 101 U. S. 320.

August Vos, besides being affected by the notice of the trust contained in the conveyance mentioned, which were links in his chain of title, had also express notice of the rights of Ellen W. Robb, as early as September 4, 1886, nine months before his purchase. Vos testified as follows on this subject:

"Q. Have you brought here the memorandum spoken of yesterday? If so, kindly produce it so that I may examine it.

"A. I have brought a copy of the memorandum. I was under the impression I had the original, but find it is a copy made by me at the time I saw the memorandum, and returned the original to Mr. Stix.

"Q. You will observe the date of this copy of the memoramdum is September 4, 1886. Was that the date spoken of by you yesterday, at which you saw the original memorandum?

"A. I said yesterday that it was my recollection that I saw this memorandum between the date of publication and the date of sale, and find, however, on hunting up the memorandum, that it was about September 4th or a few days thereafter that I saw the original. I correct my former answer that way."

See Record, mar. p. 267.

This memorandum is Exhibit B (p. 155, Record). It is a communication from Charles A. Kebler to Henry Stix, which Vos testifies that he read and made a copy of. It speaks of the property as covered by Mrs. Robb's *lien;* also of the property as covered by the deed "made to the *trustees for Mrs. Robb.*"

"It is a universal rule that if a man purchases property of a trustee with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased."

Perry on Trusts, sec. 217.

It matters not, with this knowledge or means of knowledge, that Vos and Stix paid a valuable consideration for the property. Speaking of *bona fide* purchasers, the same high authority says (sec. 219):

"This protection of a *bona fide* purchaser for value without notice is clear and certain, but it is *hedged about with great care.* It is said to be a shield *to protect and not a sword to attack.* It is surrounded with restrictions so that it may not be a cloak for fraud."

And in section 334:

"Though a trustee may thus sell even in breach of the trust, a conveyance without consideration will not injure the *cestui que trust;* as the grantee, who is a volunteer, will hold upon the same trusts as the trustee held, *and if the purchaser for valuable consideration have notice of the trust, he will still hold the estate in trust.*"

In addition to the means of knowledge referred to, the answer and cross-petition of James Hampden Robb and Charles E. Strong, trustees, in the *Gugenheim case* (Record, p. 30), the very case in which Vos and Stix made their purchase, fully sets forth that the conveyance of this property was in trust. The trustees in this case, occupying a representative relation to this suit, would not be prejudiced by acts which might, in a suit by them in their individual capacity, defeat recovery. Therefore, the fact that Robb and Strong, trustees, and not the *cestuis que trustent*, are complainants in this case, will not prejudice recovery. Nor can it be cliamed that the title of Robb and Strong, as trustees, was a mere security for the loan, and that, therefore, they

had the right to collect the money by the judicial sale referred to. There was no finding in the *Gugenheim case* that the transaction was a loan of money. On the contrary, the pleadings in that case (see answer and cross-petition of Robb and Strong, Record, p. 30) set up their true title and interest in the property as owners of the fee *in trust* and as lessors thereof, as trustees, by lease *per autre vie*. That answer prays the protection of the court to that interest. How could purchasers suppose that that *trust title* was *protected* by being placed upon the auction block? Robb and Strong made no prayer for a sale. The trustees would have had no right to disturb that investment and place the money on other property. The trust agreement gave no such authority. There were no circumstances, such as insecurity of the property or other matter, that could give rise to such implied authority. But if loan it was, it was irredeemable during the lives of Ellen and Mary Robb. True, the rent had not been paid, and the tenant, Loth, was insolvent; but that only involved getting another tenant for desirable real estate.

Wm. Stix, appellee, had knowledge of this memorandum (Exhibit B, p. 155) of September 4, 1886. It will be observed that it is addressed to Henry Stix. This Henry Stix was agent of or represented Wm. Stix, appellee, so far as the property in controversy was concerned. Vos, in his evidence (Record, p. 148), says so. Moreover, he there says that Stix was "there at the time of the sale, bidding upon the property, *either through Kebler or personally.*" Vos says that, being bookkeeper of A. J. Friedlander, who had a mortgage on some of the property in question, the memorandum came into his possession for copy. He supposes Mr. Friedlander obtained it from Mr. Henry Stix. (Record, p. 148.) Thus it is clear that Wm. Stix not only had the same knowledge which Vos possessed, but he had more besides. Kebler was the attorney of Stix in the *Gugenheim case*. He filed the pleadings for Stix and took a decree for sale on the

cross-petition of Stix. Kebler knew all about the limitations upon the powers of Robb and Strong by virtue of this trust agreement. Kebler was a party to the trust agreement. (Exhibit A of additional record.) When Stix purchased, *either through Kebler or personally*, at the sale made on his own cross-petition; in a case foreclosing his own mortgage; prosecuted and conducted by his own attorney; he was affected by all knowledge his attorney had, whether obtained in that transaction or previously.

The Distilled Spirits, 11 Wal., at p. 366.

Second. The partners of Kebler, Mr. Roelker and Mr. Jelke, did not assent that Robb and Strong should ratify the act of Kebler in entering their appearance and in consenting to a decree selling the land free of the trust title. Without such consent, Robb and Strong could not place a claim for the money received by Kebler upon a *contract basis* against the firm of Kebler & Roelker, or of Kebler, Roelker & Jelke, and enforce it against them as a *contract* right. As against Kebler, this could have been done, for by assuming to act as attorney, he consented to be held as such at the option of the parties for whom he assumed to act.

Mr. Roelker, in his cross-petition in the Coppock case (Record, p. 163), expressly disavowed all knowledge of Kebler's connection with the *Guggenheim case*, and every thing contained therein, and alleged that the matter had been concealed from him by Kebler in his lifetime—the concealment covering a period of more than two years of the partnership relation, from November 19, 1885, the date of the appearance (Record, p. 5), to the time of Kebler's death, November 23, 1887 (Record, p. 10), and further alleging that *if* there was any liability to Robb and Strong, by virtue of his partnership relations, he prayed that they be required to set it up. By this pleading, Mr. Roelker held himself in position to contest any claim of liability against him, resulting from his

partnership with Kebler. Himself having never assumed to act for Robb and Strong, and having no knowledge of Kebler's assumed agency, and of the acts that he had done in pursuance thereof, Roelker thus disavows the agency of Kebler as a *partnership* agency. In other words, he denies that there was any other agency than that of Kebler alone. It is to be borne in mind that, if there was any attempt on the part of Robb and Strong, by filing their answer in the Coppock case, to ratify an agency, it was an agency of the *firm*, and not the agency of Kebler alone. There can be no ratification of an agency that was never assumed.

To constitute an election by implication, the acts relied upon must be plain and unequivocal acts, done under a full knowledge of all the circumstances and rights of the parties. It was said in *Reaves* v. *Garrett*, 34 Alabama, 562:

"What acts of acceptance or acquiescence constitute an implied election must be decided rather by the circumstances of each case, than by any general principle. . . . An election can only be implied by plain and unequivocal acts, under full knowledge of all the circumstances, and of the party's rights. . . . One is never bound to make an election until fully informed of all the circumstances necessary to a *judicious and discriminating choice.*"

We have already pointed out that there was no remedy in the Coppock case for Robb and Strong to choose in lieu of the remedy to recover the land, even had Robb and Strong been cognizant at that time of their right to have back the land.

In 2 Story's Eq. Jur., sec. 1097, Judge Story says:

"Questions have also arisen in courts of equity as to what acts or circumstances should be deemed an election on the part of the person bound to make it. Upon such a sub-

ject, no general rule can be laid down, but every case must be left to be decided upon its own particular circumstances, rather than upon any definite abstract doctrine. Before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing was cognizant of his rights. When this is ascertained affirmatively, it may be further necessary to consider whether the party intended an election; whether the party was competent to make an election."

And in sec. 1098 he says:

"The general rule is that the party is not bound to make any election, until all the circumstances are known, and the state and condition and value of the funds are clearly ascertained; for until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice such as ought to bind him to reason and justice."

Even had Robb and Strong desired to make an election, they had not sufficient knowledge of the condition of Kebler's estate and of the value of Roelker's security to enable them to have made an intelligent choice. Kebler's affairs were in dire confusion.

In Anderson's Appeal, 36 Pa. St. 496, the court said:

"An election by matter *in pais* can only be determined by plain and unequivocal acts, under a full knowledge of all the circumstances and of the party's rights. One is not bound to elect until he is fully informed of the relative value of the things he is to choose between, and if he make an election before the circumstances necessary to a judicious and discriminating choice are ascertained, he will not be bound."

The foregoing principles are clearly sustained by all the authorities, and when applied to the present case, show conclusively how meager is the claim of implied election.

In Evans' Appeal, 51 Conn. 435, it was held that where

a widow, acting under what she believed to be good legal advice, and in ignorance of her rights, renounced a provision made for her by will of her husband, under a statute allowing her to elect between such provision and her dower, had elected to take her dower instead of the provision by will, and afterward finding that she had been improperly advised, it was held that she might at any time before distribution of the estate, even after the statutory time allowed for making the election, recall her choice and take under the will.

In considering the question of ratification or election as arising from the act of filing this answer and cross-petition, we can not accord to it the same significance as attaches to proceedings at common law where the pleading indicated to a certainty, whether it was founded upon tort or contract, there being in Ohio no forms of action. We find no case in the books where it has been decided that the mere commencement of a suit which was afterward withdrawn without issue of process, has been held to amount to a ratification. In all the cases where the pendency of a suit not prosecuted to judgment has been held to constitute a ratification, there has been either an attachment, a trial by jury or a replevin or some other step taken whereby the plaintiff had acquired some advantage. There are in the opinions in some cases, expressions such as that any decisive act would constitute a ratification or election, as the case may be; but, in those very cases, there had either been a trial of the case or an attachment, or the case was still pending when the second action was brought.

Morris v. *Robinson*, 3 B. & C. 196, was an action of trover. Plaintiffs and defendants were merchants in London. Plaintiffs were the owners of a lot of indigo, aggregating 140 chests, shipped from Calcutta to London under three several bills of lading. At the Mauritius, owing to supposed

inability of the ship to continue her voyage, the ship and cargo were sold by order of the Vice-Admiralty Court. Defendant purchased 52 of the chests of indigo at the sale ordered by that court. The proceeds were paid into the registry. The indigo thus bought by the defendant consisted *of some from each of the bills of lading.* Before instituting this action of trover plaintiff had commenced an action of trover against the ship-owners to recover the value of the shipment contained in one of the bills of lading, and had a verdict and judgment for £1,500, the total value of that bill of lading being £7,000. The plaintiff had also, after receiving information of the sale of the indigo at the Mauritius, and of all the circumstances, sent a power of attorney to Saunders & Wicke, empowering them to claim and receive out of the Admiralty Court the sum which was produced by the sale of the indigo bought by defendant- They made application accordingly on behalf of plaintiff. That application was pending at the time of the trial of the suit in trover.

It was claimed by Campbell, *arguendo*, for defendants, that the action in trover against the ship-owners was an election that discharged defendants; also that the demand in the Vice-Admiralty Court of the proceeds of the sale of the indigo bought by defendant was a ratification of that sale. The court held there was neither an election nor a ratification.

Omitting the observations of the court as to the effect of the first action of trover, we come to what is stated as to the effect of the application to court for the proceeds of sale. Bayley, J., said:

"When the owners heard that a wrongful sale had been effected at the Mauritius and that the proceeds were lodged in the Vice-Admiralty court, surely they might endeavor to obtain those proceeds without ratifying a sale; but the agent did not succeed in obtaining them; the plaintiffs, therefore, are left in the same situation as if no application had been made to that court." (p. 205.)

On the same point Holroyd, J., said:

"The power of attorney clearly furnishes no defense; nothing was done upon it; a demand, indeed, was made, but the money was not given up." (p. 207.)

In this case we are not aware that either Kebler or his partners have given up any money, nor are we aware they have ever evinced any disposition to do so.

Littledale, J., said:

"The power of attorney merely amounted to this: the plaintiffs were willing to waive the tort and take the money lodged in the Vice-Admiralty Court, but they could not procure it. Surely that ought not to bar their claim on those who had the goods. For these reasons I think that the plaintiffs were entitled to recover for all the indigo purchased by defendant."

The filing of the answer and cross-petition of Robb and Strong in the Coppock case should be regarded only as a conditional ratification.

The filing of that pleading by Robb and Strong certainly could have no greater significance than the application to court for payment of proceeds made in the case cited. In fact it should not possess as much, for the application in the case referred to was being persevered in at the time of the institution of the trial of the action of trover; while in our case the answer and cross-petition was promptly abandoned.

In *Morgan* v. *Couchman*, 14 C. B. 100, it was decided that one who consigned his goods for sale to a factor was not precluded from recovering the price from a purchaser who bought from the factor, by having previously filed a petition in bankruptcy against the factor on *the debt* created by the sale of the goods.

Curtis v. *Williamson*, L. R (10 Q. B.) 57, was an action in trover to recover the price of gunpowder bought from the plaintiff by one Bolton in his own name, but in reality as

agent for defendant, the fact of the agency not being disclosed at the time. After the plaintiffs had acquired that information, Bolton went into bankruptcy. An affidavit in the usual form, for the purpose of proving their claim against Bolton for the price of the powder, was made by plaintiffs and was sent by post to Birmingham, to be filed in the court in which the proceedings in bankruptcy were carried on. Almost immediately after the affidavit had been posted, plaintiffs' attorney, being apprehensive that a claim against Bolton's estate would prejudice their right against defendant, despatched a telegram to their agent at Birmingham not to file the affidavit. The telegram was not received until after the affidavit had been filed; but no further step of any kind was taken in that litigation, nor was any dividend received by plaintiffs. After the filing of that affidavit, the present action was begun against the principal, and the sole question was whether, under the circumstances, the filing the affidavit of claim amounted in point of law to a conclusive election by the plaintiffs to treat Bolton as their debtor so as to preclude them from maintaining this action against his principal. It was held that it did not amount to such an election. The court said:

"What is sufficient to constitute a binding election in point of law? In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge, as was done in the case of *Calder* v. *Dobell*; but there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal. Whether, in regard to proceedings taken against the agent by action at law, any thing short of judgment and satisfaction would be sufficient to exclude resort to the principal, was the

point raised in the case of *Priestly* v. *Fernie*, which was cited on behalf of the defendants. . . . The court, however, there held that where an agent who has made a contract in his own name, has been sued on it to *judgment*, even without satisfaction, no second action would be maintainable against the principal; but it is clear from the language used by Bramwell, B., in delivering the judgment of the court, that whilst it was considered that judgment against the agent even without satisfaction would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect, for he distinctly points out that by the word 'sue' he means 'sue to judgment.' If the facts in the present case were similar to those in *Priestly* v. *Fernie*, we should, of course, be bound by the decision in that case to hold that 'suing' the principal, in the sense in which the word 'sue' is there used, though the claim remained unsatisfied, amounted to a binding election; but the proceedings in question have little analogy and fall very far short of what occurred in *Priestly* v. *Fernie*. There two successive actions had been brought against the captain, one abroad and the other in this country, without any intermediate attempt, so far as appears, to hold the ship-owner liable, and the agent (the captain) had been actually taken in execution. Here, however, no action was ever commenced against the agent, and every effort was made to intercept and withhold the affidavit in bankruptcy, which had been made, as it would seem, without due consideration and without any intention whatever to discharge the present defendants from responsibility. We think it would be going much too far to hold that this was, in point of law, a binding election to deal with the agent as alone liable, and abandon all right to take proceedings against his principal. It might possibly, in an appropriate case, constitute with other facts some evidence of election to be submitted to a jury, but we can not regard it, in itself, as a legal bar to proceedings against the defendants, nor is there any question that, if at

liberty to sue the principal at all, *the action was brought within a reasonable time.*"

Priestly v. *Fernie*, 3 H. & C. 977, was an action against ship owners for failure to deliver goods. There was a plea that the same plaintiff in another court having jurisdiction, sued one Kavanaugh, master of the ship, for the same identical cause of action, wherein the plaintiff had recovered judgment, and had upon said judgment obtained a second judgment, and on that had issued a writ of *ca. sa.*, on which he had taken Kavanaugh in execution. A replication to this plea was made, that Kavanaugh, while a prisoner, had become bankrupt, and thereupon was discharged from custody under the writ of *ca. sa.* without the consent of plaintiff, and that said judgments were wholly unsatisfied, and that the plaintiff had not at any time before he recovered judgment notice or knowledge that a bill of lading had been made by the defendants. The case was heard upon demurrer to the plea and judgment was given for the defendant; Bramwell, B., saying, that in an ordinary case of a principal and agent, where the agent had been sued to *judgment*, there can be no doubt a second action was not maintainable. He said that, the very expression that "where a contract is so made, the contractee has an election to sue agent or principal supposes he can only sue one of them, that is to say, sue to judgment. For it may be *that an action against one might be discontinued and fresh proceedings be well taken against the other.*"

So it is clear from this authority that the mere commencement of an action, subsequently discontinued, would not constitute an election to bar new proceedings.

Calder v. *Dobell*, L. R. (6 C. P.) 486. The plaintiffs, cotton factors, had sold cotton to one Cherry, a broker for defendant. The contract for the sale was entered on the books as a sale to Cherry, to whom the sale note was executed and by whom the bought note was made. The invoice of the

goods was also sent to Cherry, and the same was charged to him on the books of the plaintiff, and after the cotton was delivered, repeated demands were made upon him for payment, which not being received, the goods were sold and defendant, Dobell, sued for the difference. At the time the transaction was entered into, the plaintiffs asked Cherry whom he represented, and insisted upon the name of his principal, which was then disclosed. Plaintiffs refused to trust Cherry without the name of the principal. Upon the question whether the plaintiff had elected to treat Cherry as a principal, the court said, page 491:

"Now it is contended that the very fact of the plaintiffs' entering into the contract with Cherry was evidence of election" (that is, after knowing who the principal was), "but if the parol evidence was admissible, that argument fails. Election *must be a matter of fact*, and it appears that at the time of entering into the contract, the plaintiffs expressly refused to trust Cherry. The next ground of alleged election was the demand of payment made on the broker. That, however, was an equivocal act." (*Italics ours.*)

Peters v. *Ballistier*, 3 Pick. 495, was an action of trover for a cargo of molasses which had been sold by the master of the ship, under a supposed authority, to the defendants. Before suing the defendant, plaintiffs had written him that the cargo had been wrongfully sold, and that the money had been wrongfully paid by him to the shipmaster, and demanded repayment to them. The plaintiff afterward brought an action of *assumpsit* against the defendant to recover the money. That action was discontinued before the commencement of the action of trover. (See page 498 at the bottom.) It was claimed on the trial that the action of *assumpsit* was a ratification and confirmation of the sale. But it was held otherwise, the court saying:

"In regard to the action which the plaintiffs sued

against the defendants in assumpsit for the proceeds, *if it had been relied upon*" (that is, if it had been persevered in), "it would have been a ratification of the sale." (Italics ours.) "The case cited of *Smith* v. *Hodson*, 4 T. R. 216, is strongly to that point. But the plaintiffs discovered before trial that they had misconceived their remedy, and they discontinued their suit. We can not think that these facts, separately or collectively, amount to a ratification of the sale." (p. 505.)

The misconception involved in bringing the action in the form of *assumpsit* consisted in the fact that it would have entitled the defendant to a set-off, which they could not take advantage of in trover; hence the discontinuance of the first and the institution of the second suit.

Valpy v. *Sanders*, 5 C. B. 886, was an action of trover by the assignee of a bankrupt against defendant, who had received goods in payment of a debt due him from the bankrupt after the commission of the act of bankruptcy. The assignee sent to the defendant, with full knowledge of the circumstances under which the defendant acquired the goods, a bill for the price, the same being designated as a "bill for goods supplied to you." In another letter, the solicitor of the assignee requested the defendant to pay the sum of £11, 11 shillings, and 10 pence, being the price of the goods, "by Thursday next, otherwise I have positive instructions to sue you for the same." The defense consisted chiefly of a claim to set-off, which could not be made in an action of trover, but which could be availed of in an action of *assumpsit*. It was therefore important for defendant to defeat the action in trover, which he tried to do upon a claim that the demands contained in the two letters constituted a waiver of the tort and placed the transaction upon the *basis of a contract*. But the court held otherwise. The court said the principal point discussed was

"Whether the plaintiff had, by the acts before mentioned,

affirmed the sale by the shopman as a sale by their agent, and so precluded themselves from maintaining an action of trover. The court is of the opinion that such was not the effect of those acts, and that the utmost effect to be given to them is that they amounted only to a *qualified* offer to adopt such sale, that is, if the defendant would pay for the goods, and that when the defendant refused to pay for them, it was competent of the plaintiff to repudiate the sale altogether and bring the present action." The court, in its opinion, cited the case of *Hurst* v. *Gwennap*, 2 Starkie N. P. C. 306, where goods had been delivered by a bankrupt to the defendant upon sale or return, after an act of bankruptcy. The assignee required the defendant to say whether he would keep the goods or not; the defendant elected to keep them, and thereupon the assignee delivered a bill for the goods as upon a sale by the bankrupt to defendant, and demanded payment of the amount. The defendant refused to pay, claiming a set-off, as in the case last cited. The assignee then brought trover and was held entitled to recover. That ruling by Lord Ellenborough at *nisi prius* was affirmed.

If a demand for the exact price for which the goods are sold, expressed to be on a contract of sale, does not debar the prosecution of an action of trover for the same goods, why should the mere commencement of an action be conclusive? There is no magic in the mere institution of a suit that should give it that effect.

Butler v. *Hildreth*, 5 Met. 49, was an action in trover to recover by the assignee of insolvent debtors, under the state insolvent law of 1838, the value of goods which had been sold by the insolvent debtors to the defendant some months before the proceedings under the insolvent law were begun, and for which the defendant gave his promissory note payable on demand. These notes came into the assignee's hands as part of the assets. The assignee brought an action on the notes given, and caused property of defendant to be attached.

That action was begun February 3d, and the action for trover was begun March 28th, the same year. The jury was instructed that the first action would be a bar to the second, if, at the time it was brought, the plaintiff was cognizant of all the facts tending to show that the sale was fraudulent. The correctness of this instruction was the question before the court. Chief Justice Shaw, in delivering the opinion sustaining the instruction, said:

"We are then brought to the question, what act on the part of the assignee is to be taken as proof of his election? It would, we think, be going too far to say that merely demand of the price should be allowed a waiver of his right to avoid the sale and claim the goods; because, in many cases, if the price could be obtained, it would be equally beneficial to the creditors, and he would have no further occasion to pursue the harsher remedy of impeaching the sale. But we think that, if the assignee commences an action against the purchaser for the price, and *causes his property to be attached* to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act, too, deeply affecting the rights of the purchaser, whilst it is an assertion of his own, and, if done with a knowledge of all the facts which ought to influence him in his election, it is conclusive." But then the court makes this very important qualification applicable to the present action: "But this determination will not extend to a case where facts subsequently come to the knowledge of the assignee which, if he had known them before, would have led him to a different election—whether these facts relate to the character of the sale and bear upon the question whether it was fraudulent or not, or *whether they relate to the remedy.* As if the assignee, on commencing his action for the price, believes that he has secured the amount due, by a valid attachment of the defendant's property, and afterward discovers that it *is not the property of the defendant, and that his supposed*

remedy has failed. Or, if he should discover that the defendant had an offset, which would be good against an action of *assumpsit* for the price, but not good against an action of trover. If, on any of these grounds, it should appear that he had made his election under a mistake of facts, and more especially, if he had been led into such mistake by the adverse party, it might present the question in a different view. But no mistake of fact of any kind was suggested in the present case, nor precluded by the directions of the judge.

The case where a party is not barred, by a judgment of non-suit, from having a new action, is where he has either mistaken his remedy, and brought an action which he could not maintain; or where he has two collateral independent remedies, in which an assertion of one is not repugnant to the existence of the other."

The court, speaking of the case of *Peters* v. *Ballistier, supra*, said that that decision proceeded on the ground that the plaintiffs had in the first instance misconceived their remedy, and could not maintain an action of *assumpsit;* therefore they had no election to make.

As we were not proper parties to the Coppock suit, we had no remedy there, and likewise had no election to make.

Anchor Milling Co. v. *Walsh*, 20 Mo. App. 107, was an action of replevin for certain personal property to which the plaintiff claimed title. The principal question in the case was whether the plaintiff was debarred from maintaining the action by the fact that prior to the commencement of the action of trover, he had sued out an attachment against defendant, and had caused it to be levied upon the property in question *as the property of the defendant. The plaintiff offered to show that this levy had been released prior to the seizure of the property in replevin in the present suit.* The court below excluded the evidence. Seymour D. Thompson, J., in delivering the opinion of the Court of Appeals, reversing the judgment below, said:

"But here, it is sought to make the prior act work an

estoppel to plaintiff in respect to his subsequent act. There is no element of estoppel in the case. There is no estoppel by record, for the attachment suit has not proceeded to judgment. There is no estoppel *in pais*, for the defendant has not taken such action in consequence of the suing out of the attachment that he will receive detriment in the legal sense from the conduct of the plaintiff in changing his position and pursuing a different remedy. If the rule of the Circuit Court were generalized, it will amount to this, that a litigant elects his remedy in every case, in the first instance, at his peril. If he finds that he has made a mistake, whether in consequence of erroneous views of *law or fact*, he has nevertheless estopped himself from retracing his steps. He can not dismiss his suit and institute a new proceeding of a different nature against the same party. But no one supposes that this is the law." (p. 110.) (Italics ours.)

And the Supreme Court of Missouri, in *Johnson-Brinkham Company* v. *Central Bank*, 22 S. W. Rep. 813, decided the same way. That was an action of trover for the conversion of six car loads of wheat, the property of the plaintiff, which it had sold to the Imboden Company, receiving in payment a worthless check. In the meantime, however, the wheat had been sold to the defendant. Before bringing the action in trover, plaintiff had sued the Imboden Company for the price of the wheat, and had issued an attachment and garnisheed the Missouri Pacific Railroad Company, supposing, erroneously, the wheat to be in its custody. The attachment suit was pending from the 1st to the 24th of November, but was dismissed before the action of trover was begun. The court said:

"We do not think that the bringing of the attachment suit by plaintiff against the Imboden Commission Company, nor the purchase by the plaintiff of the office fixtures, amounted, in law, to an affirmance of the sale of the wheat by the plaintiff to that company. This precise question was before

the Missouri Court of Appeals in the case of the *Anchor Milling Company* v. *Walsh*, 20 Mo. App. 107."

The court further said: "So it was held in the Supreme Court of Indiana in the case of *Bunch* v. *Grave*, that a party who imagines that he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one. The bringing of the attachment suit had a tendency to show a waiver by the plaintiff of the payment of the purchase money for the wheat, but as the writ was dismissed before judgment thereon it was no affirmance of the sale, nor was it a bar to the prosecution of this suit."

See *Bunch* v. *Grave*, 111 Ind. 357.

In *Smith* v. *Bricker*, 53 N. W. Rep. 250, the Supreme Court of Iowa decided that an exchange of valuable town property for farm land, in another state, practically worthless, but honestly represented to be good farming land, would be rescinded in an equitable action, although the defendant had no knowledge, at the time, of the falsity of the representations. It was further decided that the commencement of an action at law by the plaintiff for damages for such false representation, would not constitute an election, so as to prevent the plaintiff from bringing the equitable action to rescind, after he had ascertained that the action at law could not be maintained because of the inability to prove the *scienter*. Of the action at law the court said plaintiff had not thereby (as was contended) affirmed the agreement in the sense that the plaintiff sought to take advantage of it. On the contrary, he demanded no more or less than he did in the suit in equity; that in one action, as in the other, he sought to save himself from loss by reason of the voidable contract.

The court used this language:

"He did not prosecute his action at law to judgment. The plaintiff did not abide the event of his action at law. As soon as he discovered that the defendant claimed that he did not know his representations were false, he amended his

pleadings so that the proof of a *scienter* was not necessary. We have examined the authorities cited by counsel for appellant upon this question, and have to say that we do not think any of them are applicable to a state of facts such as this record discloses."

Nason v. *Cockroft*, 3 Duer, 366, was an action by vendor against defendant to recover the value of a quantity of flour. The defendant in buying the flour acted as broker, but did not name his principals, and the plaintiffs did not know them. The sale was treated as one between the plaintiffs and defendant. Subsequently, plaintiffs discovered the real purchasers, and entered into an agreement with them in writing to leave the matter to the decision of arbitrators, but the arbitration was not prosecuted. Afterward, the plaintiffs sued the defendant, who purchased the flour as a mere broker. It was claimed that this agreement with the real purchasers, to arbitrate, was an election to look to the principal, and not to the agent. On that subject the court said:

"The only effect of the discovery is that the principal and agent are both liable; and the seller may at his election proceed against either or both; and it is clear that *the mere commencement of a suit* against the principal would not discharge the agent, we can not see why that effect should be given to a submission to arbitration which had no result. We can not, therefore, give to the paper in question the legal effect which counsel for defendant claimed for it."

In *Becker* v. *Walworth*, 45 Ohio St. 169, suit had been commenced by an owner in fee of land to recover rent of the premises from one in possession thereof as executor of lessee for years. The action was commenced against him *as executor*. Before answer was filed, the plaintiff amended his petition by filing a petition against the defendant in his individual capacity, the estate of the decedent being probably insolvent. It was claimed that, having paid the rent for a number of years as executor, for which payments he held a

number of receipts reciting the money to be paid by the executor, and *suit having been commenced* against him *qua* executor, the plaintiff had thereby elected to hold him as executor, and could not now hold him liable individually. The court held:

"2. In such case the lessor has an election either to look to the estate of the deceased alone for such rents, or to hold the representative personally liable therefor.

"3. The giving by the lessor of receipts for a portion of the rents accruing during such occupancy to the representative as such, and the commencement by the lessor of a suit against him in his representative capacity to recover a balance due, which is discontinued, do not constitute such an election as will bar the prosecution of a claim by the lessor to recover such balance of the representative in his individual capacity." (Syl., par. 2, 3.)

It is true the judge writing the opinion went on to show with nice discrimination that the remedy for recovery of rent by suit against the executor, as such, and the remedy for its recovery by suit against him individually, were not necessarily inconsistent; yet it can not be denied that the effect in the two cases as far as result is concerned may be very different. The court, in discussing what acts are necessary to constitute an election, says:

"It may be said, as a deduction from the authorities on the subject, that an election is the making of a choice between two or more *benefits* or rights which estops the party from afterward denying that an election has been made, and from demanding some benefit or right other than the one chosen. Except in cases where his conduct has been such as to mislead another party to his prejudice, the party having a right to elect must have proceeded upon the idea that he was bound to elect; he must have had knowledge of his obligation to elect as matter of law; there must have been a *purpose* to elect and an *actual* election." (p. 178.)

Certainly, one who is made or is attempted to be made party to a case by adverse proceeding, and who files an answer therein under the belief, whether well founded or not, that he is obliged to so appear, and who afterwards finds that he was not properly a party to the case, but only an interloper; and who had acquired, and could acquire, no rights therein, has not done that which amounts to an *actual* election. Indeed, he has done nothing but a vain act. It was a mere inadvertence. In the same opinion the court said:

"The commencement of the action by the filing of an original petition against defendant, as executor, worked no prejudice to him, and it is not easy to see why such commencement of the action should preclude amendment on the part of the plaintiff in order to charge him personally. It was no more than the discontinuing of one action and the commencement of another, and this may have been induced *by the discovery that the one would prove wholly fruitless.*" (p. 175.) (Italics ours.)

Dean v. *Yates*, 22 Ohio St. p. 388, was an action of trover for value of goods, which the plaintiff had been induced to part with, as upon a sale, by fraudulent representation by the buyer as to his identity, so that no title passed by delivery of the goods. In the action, which was against both the fraudulent buyer and his vendee, an attachment was issued and levied upon some of the same goods; and that was held not to be a ratification of the sale. It is true the attachment was issued on the ground of fraud. But still, how could goods be attached as goods of those *defendants without thereby recognizing* title in the vendee by the sale, which the plaintiff's case assumed was void? The court said:

"An intelligent and intentional ratification, by the injured party, of a contract voidable on account of fraud, will, as a general rule, preclude the party from afterward insisting upon the fraud as a cause of action. And had the affirmance of the contract, and consequent waiver of the fraud,

been made an issue in this case, such seizure and sale, no doubt, would have been circumstances admissible for the consideration of the jury. But as a matter of law, they would not necessarily have controlled the verdict; or in other words, such seizure and sale, made in an action based solely on the ground of fraud, do not, as matter of law, amount to such ratification. Of course, however, the disposition made of the goods so seized should be considered in the assessment of damages." (p. 398.)

Indeed, it would not be going too far to say that in a case like the present, Robb and Strong ought to have been allowed, had they desired to take such course, to have obtained all the reparation possible from Kebler and his partners for the common good of all the sufferers by this fraudulent and unauthorized sale of this land, without prejudice to anybody's rights. Had Robb and Strong recovered in part or in whole the purchase money, and afterward sued for the land, the money thus gained would be treated in equity as the property of Vos and Stix, and would constitute a lien on the land.

Frank v. *Jenkins*, 22 Ohio St. 597, is an interesting and well considered case.

It was an action of replevin brought by Jenkins, Bro. & Chipman against Frank to recover the possession and title to five bales of cotton. Frank, who lived in Mississippi, was originally the owner of the cotton which he had shipped together with large quantities of other cotton to one Trotter, a commission merchant in Memphis, *for sale.* Jenkins lived in Boston and was there engaged in the business of receiving shipments of cotton from Memphis to Boston and making advances of money thereon. Trotter shipped the five bales, together with seventy other bales, to Jenkins at Boston, having received on the whole seventy-five bales an advance from Jenkins of seven thousand dollars. The cotton was routed by river to Cincinnati, thence by rail, and the bills of

lading of the steamboat and rail line were delivered at Memphis to the agent of Jenkins.

When Frank discovered the disposition made of this cotton he went to Cincinnati, and there began two suits the same day. One was an action of replevin against the master of the vessel to regain the property, the other an action against Trotter, the commission merchant, to recover a large sum of money claimed to be due from him, *including the price of the five bales of cotton in controversy.*

It should be explained that by the law of Ohio as it then was an action of replevin vests the title and possession of the goods at once in the plaintiff, the officer receiving in lieu of the goods an undertaking to pay their value.

Five days afterward Frank also brought a suit in Boston against Trotter for money due, and the sum thus sued for, as we understand the report of the case, included the price of the five bales. In that suit an attachment was issued against Trotter, and process of garnishment was served on Jenkins, Bro. & Chipman under a claim that they were largely indebted to Trotter. How Jenkins could have been largely indebted to Trotter, having had no dealings, except to advance money on cotton shipments, is not to be otherwise accounted for, except on the theory that the cotton in the hands of Jenkins exceeded in value the amount he advanced. That theory presupposes a right in Jenkins to sell the cotton, including the five bales, in order to realize advances, leaving a possible surplus attachable as money of Trotter. This effect of the garnishment proceedings evidently controlled the judgment of the court. Two days after the service of this garnishment upon Jenkins, he also began in Cincinnati an action of replevin against Frank for the cotton. The contest then was, which had the better title, Frank or Jenkins? It was admitted that the pledge of the cotton, having taken place in Tennessee, was by the law of that state, unauthorized. The suit by Frank in Boston and his

garnishment served there on Jenkins, Bro. & Chipman, importing, as it did, that Jenkins was largely indebted to Trotter, which could only be true in case the cotton belonged to Trotter, was held to have constituted, together with the Cincinnati suit, an election to treat Trotter as the owner of the cotton, thus validating his pledge of it to Jenkins. The court said:

"It is well-settled law that an action by the owner for the price or purchase money of goods sold by an unathorized agent may be regarded as, and *prima facie* is, a ratification of the sale." (p. 604.) Then the court states instances, like those in our case, when such an action would *not* be, *prima facie*, or at all a ratification.

It said:

"If either of the actions by Frank was brought under mistake, it was his duty, under the circumstances, promptly to dismiss or abandon it, upon discovery of the mistake. No such mistake or abandonment is shown. On the contrary, Frank persistently, and up to the date of the trial, maintained at least one of his actions for the price of the goods, and thus seemed to claim both the cotton and its value" (the former by the replevin suit). "Failing thus to make an election, it seems to me that in equity the other party might well elect for him. Had he, when the replevin action was commenced against him, promptly informed Jenkins, Bro. & Chipman that he commenced the action or actions for the price of the cotton by mistake, or that he would dismiss or abandon them, *no doubt they would by law have been remitted to their action against Trotter*, provided they had not been misled to their prejudice by the actions of Frank. Under the circumstances, we think that Frank is estopped, as between him and Jenkins, Bro. & Chipman, from denying he ratified the agency of Trotter in shipping the cotton to them as he did." (p. 605.)

Stix and Vos were not proposing to take any step or do other thing that would be influenced by any action we might take, and hence Robb and Strong were under no obligation

to inform them of the circumstances under which they filed and afterward withdrew their answer and cross-petition in the Coppock case.

Suppose that Robb and Strong had filed a demurrer in the first instance to the cross-petition of Roelker, instead of filing an answer. It would not be claimed such a step would have been an election to proceed in that case. Then does it make any difference that, overlooking for the time the demurrable nature of the cross-petition, they first answered and then by leave substituted for that pleading a demurrer, whereby they were dismissed?

Whether there was a ratification does not, of course, depend upon the number of days the answer and cross-petition was on file. But upon its effect, taken with the circumstances. We insist there was a *locus penitentiæ* reserved to Robb and Strong, arising from the fact that they had no footing in that case. They might as well have filed that answer and cross-petition in some pigeon-hole, or in a patent suit by John Smith, as to file it where they did, so far as there was a chance to realize a benefit thereby.

In *Huffman* v. *Hughlett*, 11 Lea, 549, the plaintiff's logs had floated down the river to a saw-mill. There the defendant, Springer, sawed them into lumber, which he sold to defendant, Huffman. The owner sued Springer in action on debt account for the value of the logs, and issued an attachment. Afterward, he joined as a defendant in that action the purchaser of the logs. It was held that the commencement of the suit against Springer, although an attachment was issued, did not ratify his sale of the lumber to Huffman.

In *Wells, Fargo Co.* v. *Robinson*, 13 Cal. 134, Frierson, their cashier, had embezzled funds, which the company claimed he had invested in gas stock. After his death, a suit was brought against his administrator by a bill in equity to trace the money into that fund and establish their equitable claim to the same, the estate of Frierson being insolvent.

Before filing such bill, the Fargo Co. presented to the administrator of Frierson the claim for the amount of money Frierson had embezzled, averring that his estate was indebted to the Fargo Company in that amount, and further stating that $50,000 of the sum had been advanced by Frierson to the gas company, and that the plaintiff claimed a lien for that reason upon all gas stock of the estate of the decedent. The administrator rejected that claim, and thereupon the Fargo Company began a common law action for the whole amount of the claim as a money demand. During the pendency of the suit the present bill was filed. But that suit proceeded to a trial and a judgment in favor of the Fargo Company for the whole amount before the bill in equity came on for hearing. No part of the judgment was paid, however. It was earnestly contended that the filing of the claim with the administrator and obtaining judgment thereon constituted an election which debarred the plaintiff from pursuing the equitable remedy by a bill in equity to establish a claim to the stock. In a carefully prepared opinion by Baldwin, J., concurred in by Field, J., it is said:

"We think the suit brought at law by the plaintiffs under the circumstances, and the judgment taken—the bill in equity still pending—and the distinct claim set up to this fund and afterward prosecuted to judgment, evidence of no such distinct and deliberate choice to take the general claim on the estate for money in lieu of the claim on this fund, as to bar the plaintiffs from prosecuting their equitable claim. It would be unreasonable to suppose that they intended to surrender a claim on a specific fund they were then prosecuting for a judgment against the administrator, which would give them no better right to participate in this fund than the rest of the creditors; that is, that they meant that property bought with their money should be equally distributed among all these creditors. The case would be stronger for the appellants if a judgment here had the same effect as at

common law. But under our system, a judgment is but little if any better than an allowance by the administrator, and approval of the probate judge. It fixes a recognized claim on the estate; that is, it furnishes a voucher which protects the administrator in its payment. But it gives no priority and carries with it no means of security, or coercive payment by execution. No injury has been done by the judgment. For any credit to which the estate may be entitled under this bill, and the decree, the administrator may require a rebatement from the judgment."

Ex parte Adamson; In re Collie, 8 Ch. D. 807, is in point. In that case Adamson was a creditor, for over £120,000, of the firm of Alexander Collie & Co., which went into bankruptcy. He proved his claim against the joint estate, that is, against the firm, and received a dividend thereon. Afterward, learning that the dividend from the separate estates of the partners would be larger than the joint dividend, he proved his claim against the separate estates and offered to return the joint dividend. The registrar refused to allow the proof of claim against the separate estates, holding that Adamson had the right to elect between the joint estate and the separate estates, and that he had made his election by proof of claim and receipt of dividend, and could not now change it.

The Court of Appeals reversed the decision, holding that there was no election; or, if there had been, it might be changed upon refunding the dividend. In the course of a learned opinion, James, L.J., said:

"It is quite clear that Mr. Adamson never dreamt of electing, never knew any thing about electing, and never knew that he had the rights between which he is deemed and adjudged to have elected. To say that such a man had elected is to say the thing that is not, and it is no more open to a court or a judge to say the thing which is not than it is to other men; and the question, then, really is, not whether

cision supporting the contract was that the common directors were only a small minority of the members of the board of the railroad company, and that independent of those members, there was a majority of the railroad board who approved the contract. There is nothing at all applicable in the opinion of the court to the present case, except perhaps the bare statement that "a ratification once made becomes as irrevocable, obligatory, and binding as if the acts of the agent were previously authorized." As an abstract proposition, that is true, with limitations not now necessary to mention.

Mechem on Agency, sec. 151, contains the statement: "One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon such an act."

We have examined the cases referred to in the note as the basis of the above statement, and find that, with one exception, the nature of the actions was such as to require proof of a previous demand upon defendant. The only demand made was by an unauthorized person acting in the name of the plaintiff. It was held that the demands were ratified by basing suits thereon. It could have hardly been held otherwise in those cases, though there are a number of instances where it is necessary that the person making the demand should have authority at the time he makes it; as where rent is demanded from a tenant by one assuming to act for the landlord; he must have actual authority at the time of making the demand, for otherwise a payment of the rent would not release the tenant.

THE NEW YORK CASES.

There are so many cases on the subject of ratification and election of remedies in New York, that we deem it proper to consider them under a separate head.

Some of these cases will be relied upon by appellees to sustain their contention in this case. We have examined all of them carefully, and find they are distinguishable from the case under consideration.

Terry v. *Munger*, 121 N. Y. 161. In this case are several expressions of the judge who wrote the opinion that might be urged as stating the doctrine adversely to our contention; but when what is there said is taken in connection with the facts under consideration, it will be seen that *Terry* v. *Munger* is in no wise opposed to any thing claimed by us.

It was an action brought against George A. Munger for damages for taking and carrying to North Carolina, certain machinery which had belonged to the plaintiffs and one Kipp. In a previous action these plaintiffs had sued Kipp and P. W. Munger, in which they alleged that they and Kipp owned this machinery as partners, and that the partnership had been dissolved; that Kipp and P. W. Munger had entered into a co-partnership for the manufacture of lumber in North Carolina, and had entered upon the real estate where the machinery was, and had detached it and taken it away for their sole use. That action was an action on contract to recover the value of the plaintiffs' interest in the part removed, and to compel Kipp to pay the plaintiff for his interest therein as upon a sale of the property by Kipp to P. W. Munger. In that action the plaintiffs had not only recovered a judgment for the value of their interest in the property, but the defendant in the judgment was taken in execution. The nature of that action, as explained above, is fully shown by the opinion of the court, in 88 N. Y. 637 and 638, beginning with the last paragraph. In view of the previous action and recovery of judgment for the price of the machinery, it was held that the plaintiffs in that action could not now maintain an action of trover against George A. Munger for his participation in the same taking of the same machinery. The decision

in *Terry* v. *Munger* is entirely consistent with principle, for the court says (p. 166), speaking of the former action:

"The plaintiffs having treated the title to the property as having passed to the defendant in that suit by such sale, can the plaintiffs now maintain an action against another person, who was not a party to that action, to recover damages from him for his alleged conversion of the same property, which conversion is founded upon his participation in the same acts which plaintiffs in the old suit have already treated as constituting a sale of the property? We think not."

That is to say, have so treated by suing and getting judgment. Yet expressions unnecessary to the decision, found in the opinion, need some notice.

At page 167 the judge says:

"Any decisive act of the plaintiffs, with knowledge of all the facts, would determine their election in such a case as this."

For this he refers to *Sanger* v. *Wood*, 3 Johns. Ch. 421. In *Sanger* v. *Wood*, the language used by Chancellor Kent was:

"Any decisive act of the party, with knowledge of his *rights* and *of the fact*, determines his election in the case of conflicting and inconsistent remedies."

Neither Chancellor Kent nor the judge writing the opinion in *Terry* v. *Munger* state what would be a decisive act. It is significant, however, that both in *Sanger* v. *Wood* and in *Terry* v. *Munger*, the acts relied upon to constitute election consisted not only in the commencement of a suit, but in the procurement of a judgment and an issue of execution therein.

Chancellor Kent referred as the authority for his statement to the case of *Ex parte Ward*, 1 Atk. 153, and other like cases, which hold that a creditor who has petitioned for and obtained an adjudication of bankruptcy against his debtor can not thereafter retain his debtor in prison, the ground being that by obtaining the adjudication in bankruptcy, the

creditor has determined his election. By looking to the case of *Ex parte Goodwin*, 1 Atk. 153, we find the reason for this stated as follows:

"This court will not suffer a petitioning creditor to arrest a bankrupt; and for this reason, because a commission of bankruptcy is considered by them *as an action and an execution in the first instance;* and after the petitioning creditor has laid hold of all the bankrupt's effects, it would be a great absurdity for the same person to be permitted to arrest him likewise."

We can see that such a proceeding is an act quite *decisive.* Much more so, indeed, than would be the mere commencement of a civil action not prosecuted to judgment, nor accompanied by attachment or other process of seizure.

The judge writing the opinion in *Terry* v. *Munger* further stated that the commencement of an action would be an election as conclusive as the judgment would be. This statement is a mere dictum, and was not required by the facts of the case nor sustained by the authorities.

He further refers to the case of *Conrow* v. *Little*, 115 N. Y. 393, and says it is to the effect that the commencement of an action, where all of the facts are known, is conclusive evidence of an election.

But this statement needs qualification.

An examination of *Conrow* v. *Little*, 115 N. Y., shows it to have been an action of trover to recover the value of certain reams of paper claimed to be property of the plaintiff. The paper had been delivered to the defendant by the plaintiff under an arrangement whereby plaintiff sold it to one Branscom, who was engaged in printing a book, and who had made a contract with Little for printing. Little had refused to do the printing until satisfied that Branscom had secured a contract from a reliable party for a sufficient supply of paper. Conrow, to satisfy Little, stated to him in the presence of Branscom that he had sold to Branscom the pa-

per necessary for the book, and would deliver it to Little to be used by him for printing the work. The paper was delivered accordingly to Little. To pay both Conrow for his paper and Little for the printing, Branscom gave forged promissory notes of one Richardson. Upon discovering this fraud, Conrow brought an action against Branscom to recover $7,685.57, that amount representing the price of the paper and borrowed money. In that action, Conrow issued an attachment, which was levied upon money of Branscom on deposit in bank. Part of the money, to wit, $2,915, was paid to Conrow in pursuance of the attachment, and was applied on account of the money theretofore loaned by Conrow to Branscom. It is true this payment of $2,915 was made on Branscom's check, but the court said of this:

"It is not important that it was drawn on Branscom's check, for the attachment was still in force and the suit pending, and the effect of that proceeding as to third parties could not be defeated by adopting another method to get the money out of the bank. Nor could its voluntary application upon a debt other than that contracted for the paper, permit the plaintiff to re-assume the title to it." (See page 395.)

This same attachment was also levied on the paper then in the hands of Little, *as being the property of Branscom*, under whom Little claimed title. The attachment suit was subsequently discontinued, but not until after the plaintiff had, by means of the attachment suit, obtained the payment of part of his debt, and obtained a levy upon the paper as the property of Branscom, thereby necessarily recognizing it as his.

The case of *Conrow* v. *Little* is, therefore, by no means an authority for the statement that the mere commencement of an action is conclusive evidence of an election, much less is it authority for the statement that the discontinuance of the attachment was immaterial. That statement is misleading, unless the circumstances under which the discontinuance occurred are explained.

In *Conrow* v. *Little*, the court, speaking of the time at which plaintiff's election should be considered as final, said:

"We think that time was when they commenced an action for the sum due under the contract, *and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor.*" (See bottom of page 393 and top of page 394.)

The decision in *Conrow* v. *Little* really rests upon the ground that Little had a lien upon the paper for the work that he had already done on it, and consequently a right to retain it. What was said in reference to the election of remedies and ratification was merely by way of an additional reason for supporting the judgment of the court below. There also existed in the case an estoppel. (p. 395.)

The court further said:

"Taking any step to enforce the contract was a conclusive election not to rescind it." (See bottom of page 394.)

This statement to be of value must, of course, be understood as referring to such steps as were taken in the case, namely, by attachment and levy on the property as that of the party under whom the defendant in trover claimed title.

Moller v. *Tuska*, 87 N. Y. 166, was an action of replevin of sugar brought by vendor against vendee. The court held that the bringing of such an action and the taking of the goods thereunder was a disaffirmance of the contract of sale. And that the defendant in replevin could not defeat that action by showing that the plaintiff had, after the replevin was commenced, proved a claim in bankruptcy against the defendant in the replevin suit for the price of the sugar, and had drawn a dividend thereon, which he subsequently refunded to the assignee after the register in bankruptcy had expunged his proof of claim. It is to be remembered, however, that the plaintiff in replevin did not abandon the replevin in connection with his proof of claim in bankruptcy either before or after making that proof, but continued to

press his replevin suit, thereby persisting in his disaffirmance of the contract of sale. It is true the court said:

"The plaintiffs manifested their election by bringing this action."

But that was an action in replevin in which the first step consisted in taking the goods.

Rodermund v. *Clark*, 46 N. Y. 354, was an action of damages for conversion of a vessel owned one-half by Ward, plaintiff's vendor, and one-half by Clark, defendant's vendor. The conversion complained of was the sale by the half owner to the defendant of the entire vessel. At the time of the transaction, Ward, the half owner, protested against the sale. He accordingly refused to give up the vessel to Clark's vendee, and continued in possession and in command. When navigation opened, Ward made two trips with the vessel as half owner and as her captain. After this the alleged purchaser of the vessel, claiming to be the sole owner thereof, brought suit against Ward to recover possession, in which suit the vessel was seized by the sheriff, a redelivery bond was executed by Ward, already in possession, and to whom the vessel was redelivered by the sheriff. Ward afterward continued in possession until the vessel was libeled in the United States Court by the purchaser as sole owner. In that suit, Ward, the half owner, allowed judgment, finding the purchaser to be sole owner, to go against him by default, and allowed the vessel to be delivered to him. Ward, having given the plaintiff an assignment of all his interest in the vessel and of all causes of action against Clark for selling her, the present suit was commenced to recover damages as for conversion. The court held that Ward might have brought action for conversion in the first instance, but that after repudiating the sale as of no effect on his ownership, and making two trips with the vessel, and replevying her when seized by the sheriff, he could not now maintain trover on

the theory of damage done to his interest in the vessel by the sale. The court said:

"Ward then had two courses, either of which he might pursue. He could sue the defendant for the conversion, or he could assert his right of possession by keeping a permanent possession, or regaining possession if it was interrupted. The *effectually* taking of either of these two courses precluded him from taking the other." (p. 356.)

And the court further said:

"The mode Ward had first chosen had until then been effectual to preserve to him his property and the possession of it, and when that was interfered with by Malcolm in his suit in the United States Court, it was the duty of Ward and the plaintiff not to abandon the property, but to persist in a defense of his right." (p. 357.)

In *Bank of Beloit* v. *Beal*, 34 N. Y. 473, the decision was that the recovery of a *judgment* by the owner of goods against his agent, for the price which the agent had received for the goods, and the taking the body of the agent in execution, was a confirmation of unauthorized sale of goods by him.

We concede that a judgment for the price of the goods would clearly be an election to look to the agent alone.

Littlefield ads. *Brown*, 1 Wendell, 398, is a case much referred to in discussions on this branch of the law. The plaintiff had taken his judgment debtor in execution. There had been a voluntary escape of the prisoner between the issue of the *ca. sa.* and the return of that writ. However, when the writ was returned the prisoner was again committed, and remained several months within jail liberties: then discovering a defect in the writ, he left the jail. *After the first escape* the plaintiff brought an action against the sheriff, and *that action was brought to issue and noticed for trial.* When it was called, the plaintiff did not appear, and judgment, as in case of non-suit, was rendered against him. Plaintiff then began the present action for the second escape.

In that second action it was held that the first action constituted an election to consider the prisoner out of custody from the time of the first escape, and that once out of prison with assent of plaintiff, always out of prison, in such cases, and that consequently there was no second imprisonment and therefore no second escape.

In the case of *Lloyd* v. *Brewster*, 4 Paige Ch. Rep. 537, a judgment at law for price of goods sold had been obtained against the defendant. Plaintiff in that judgment filed his bill in equity as a judgment creditor to set aside certain conveyances of his property by the defendant. On hearing, the bill was dismissed, the evidence showing that the assignment sought to be set aside was for value. Thereafter the plaintiff asked leave to amend his bill and aver that the original sale of the goods, for the price of which he had obtained judgment, was induced by fraudulent representation as to the solvency of the buyer and for leave to proceed on that line. His right to file such an amendment was denied on the ground that the action and judgment at law operated as an affirmance of the sale.

Sanger v. *Wood*, 3 Johns. Ch. 416, is very often quoted. It was a suit in equity brought by one tenant in common against the other. The common property consisted of a mill and forty acres of leasehold land adjoining, and had been managed exclusively by the defendant. He rented the property to a tenant, who, after paying one year's rent, absconded. Afterward the defendant, with assent of plaintiff, sold the premises for $6,500, payable in installments, in ten years, and the purchaser was put in possession. The defendant represented to the plaintiff that these purchasers would be unable to make the payments, and by such representations induced him to sell his interest to the defendant for $866, much less than its value. The defendant, however, signed an agreement that all rents due from the absconding tenant, or that might be recoverable from

Jones and Merricks, the purchasers, on rescinding the sale, should be divided between the parties in the same manner as if the sale had not been made; and if the sale to Jones and Merricks could be enforced, it should be. The plaintiff charged that when the defendant represented the unlikelihood of the purchase price being paid ($6,500), he knew those payments would be made, as in fact they were, whereby defendant had realized a profit. The object of the bill was to compel him to account for that profit. The defense, among others, made to the bill was that the plaintiff had brought an action at law against the defendant on the contract, whereby the defendant had agreed to buy plaintiff's interest and had *obtained judgment, having full knowledge of all the facts which the present bill alleged* as constituting fraud. This was held to be an election to affirm the contract of sale of his interest to the plaintiffs.

The court said, speaking of the plaintiffs:

"They had no right to try the experiment how much they could recover at law under the contract (for the bill admits the suit at law was brought upon that agreement) before they elected to waive it, and then, *retaining their verdict and entering judgment at law*, apply to this court to set the contract aside. This proceeding would be giving plaintiffs a double advantage, and is unreasonable and inadmissible."

In the present case we obtained no verdict, and entered no judgment, and have obtained no advantage, so that our suit does not fall within the above condemnation.

In stating the ground upon which its judgment was based in that action, the court said:

"And I consider the going to trial in the action at law, and especially the entry of judgment afterwards upon the verdict, as a decided confirmation of the settlement in April, 1816. I shall accordingly dismiss this bill." (See p. 422.

So we find no case wherein it has been decided that the bringing of an action constitutes an election or ratification where the action was discontinued before process issued or rights were affected. Were this otherwise, we insist that in this particular instance the filing of the cross-petition was not the equivalent as an evidence of ratification to the institution of an independent suit, because the Coppock case, as the court decided, afforded no means of relief to us against Kebler's assets or against Roelker and Jelke personally.

Respectfully submitted.

EDWARD COLSTON,
JUDSON HARMON,
GEORGE HOADLY, JR.,
Counsel for Appellants.

CINCINNATI, O., *January* 8, 1894.

Robert Clarke & Co., Printers, Cincinnati.] January, 189[illegible].

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893. TERM NO. 252.

James Hampden Robb and Charles E. Strong, Trustees,

Appellants,

vs.

August Vos and William Stix,

Appellees.

BRIEF FOR APPELLEE, AUGUST VOS.

STATEMENT OF THE CASE.

Appellants' "statement of case" in their brief is confined substantially to the allegations of their bill.

Additional facts involved may be stated as follows:

Appellants' bill in the Circuit Court, No. 4,148, was filed May 31, 1888. (Record, p. 1.) Prior to this, on May 12th, they brought a suit in the Superior Court of Cincinnati, Hamilton county, Ohio, No. 43,368, against these appellees. (Stipulation and Addition to Record, pp. 1 and 17.) Their petition in that suit sets forth not so fully, but in substance, what they subsequently put into their said bill, the deed from Loth to them and the lease back of the property in question, the terms of the trust, the proceedings in the *Gugenheim* case, the various steps taken therein on their be-

half by Charles A. Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, charged to be without their knowledge or authority, the sales to Vos and Stix, and the payment of the proceeds to Kebler, Roelker & Jelke. They do not, as in their bill, charge Charles A. Kebler with embezzlement of this money, but say that they have not received any portion of it. They say, "that they were never parties to said cause in law or in fact, and that the said sale as to them is null and void." They further say, "*that the said transactions between them and the said Moritz Loth were in truth and in fact a loan by them to the said Moritz Loth of the sum of* $10,000, *in consideration whereof the said Moritz Loth conveyed to them the premises hereinbefore described, and they executed to the said Moritz Loth the lease hereinbefore described, containing the privilege of purchase for the said sum of* $10,000; *and they say that in consequence thereof they have a first and best lien upon the said premises in the said sum of* $10,000, *with interest thereon, and that there is and remains due and unpaid thereon the sum of* $10,000, *with interest thereon from January* 1, 1885, *at six per cent per annum.*"

They pray that their said lien may be established, and that the said premises may be sold for the satisfaction of their said claim of $10,000 and interest.

It will be observed that appellants, a few weeks afterward, proceed in the Circuit Court on the theory that the said deed from Loth was absolute, and they seek to set aside the sales to Vos and Stix, and to enforce the terms of the said lease. (Record, pp. 11, 12.)

In the Superior Court case, summons was issued May 12, 1888, and served on August Vos, May 18, 1888.

On June 7, 1888, Vos filed his answer and cross-petition in said case, denying that the alleged acts of Kebler for the said Robb and Strong, trustees, in the *Gugenheim* case, were without their authority, knowledge, or consent, admitting the sale to him under the proceedings in that case, and that

the transactions between them and said Loth were in fact a loan by them to him of $10,000 at six per cent interest secured in the form of said deed and lease, but denying that they have any lien on said premises therefor or that any part thereof remains unpaid. By way of cross-petition, the said Vos sets up the proceedings in the said *Gugenheim* case, and avers their regularity, and that said proceedings, orders, decrees, sale, and deed vested in him a valid title in fee-simple to the said real estate purchased by him thereunder, free from all claims of said appellants and other parties to said cause, his payment therefor of $9,100, and his possession thereof ever since the conveyance to him, May 24, 1887. He prays "*that the said claim and interest of the said Robb and Strong, trustees, in and to said real estate may be adjudged to be null and void, and that his title aforesaid may be quieted against the same and for all other proper relief.*" (Additional Record, pp. 21–24.)

On June 8, 1888, upon motion of said Robb and Strong, trustee, their said petition was dismissed, and as to the said cross-petition of Vos, the cause was continued for further proceedings. (Additional Record, p. 25). On July 7, 1888, the said Robb an Strong, trustees, filed their petition in said cause 43,368, Superior Court of Cincinnati, for a removal of the same on the cross-petition of said Vos to the Circuit Court of the United States, in and for the Southern District of Ohio, Western Division, and the order of removal was made.

In said petition they say that they are citizens and residents of the State of New York; that August Vos is a citizen and resident of the State of Kentucky, and William Stix is a citizen and resident of the State of Missouri. They further say that the said suit "is one of a civil nature, where the matter in dispute exceeds, exclusive of interests and costs, the value of $2,000, and is one in which there is a controversy on cross-petition between citizens of different states."

They then state the facts, in substance, averred in their said petition filed May 12th, and in said cross-petition of August Vos, the dismissal of their said petition, June 8th, and their remaining in the case only as defendants to said cross-petition of Vos. (Additional Record, p. 26.)

On October 2, 1888, the transcript of the record in said case was filed in the said Circuit Court, and numbered therein 4182. (Additional Record, p. 17.)

On October 4, 1888, the said Vos filed his motion in said Circuit Court for the remanding of said cause No. 4,182 to the Superior Court of Cincinnati, *for want of jurisdiction in said Circuit Court.*

On November 17, 1888, the Circuit Court overruled said motion. To which overruling the said Vos then entered his exception. (Add. Record, p. 28.)

On November 26, 1889, on motion of the said complainants, said cause No. 4,182 was consolidated by order of court with said cause No. 4,148, all further proceedings to be had under the latter number. (Record, p. 157.)

In No. 4,148, complainants' bill states the citizenship and residence of the parties as in their petition in the Superior Court case. They were all non-citizens and non-residents of Ohio. It alleged that said Robb and Strong, trustees, owned certain valuable real estate in the City of Cincinnati, Ohio, which was in the possession of tenants under a lease for the life of two persons for whom said trustees acted. A judgment creditor of the lessee sought by judicial proceedings in the Court of Common Pleas of Hamilton county, Ohio, to subject his interest in these and other lands to payment of his claim. The petition was in the nature of a creditor's bill, and made parties defendant a number of persons, including said trustees, holding deeds from the lessee, and charged that these deeds were intended as mortgages, and prayed that

they be so decreed, and the property sold to satisfy said judgment.

The trustees were non-residents, and Kebler, of the law firm of Kebler & Roelker, and purporting to act for that firm, entered their appearance in the case and consented to a sale of the fee, it is alleged, without their authority or knowledge. The property was sold at judicial sale, and the proceeds received by Kebler and not paid over or accounted for by him to said trustees. The defendants, Vos and Stix, were purchasers. The bill seeks to avoid the title so acquired by them, on the ground that the sale was absolutely void by reason of the fraud of Kebler.

On August 2, 1888, the defendant, Vos, filed a demurrer to said bill. (Record, p. 69.)

On August 28, 1888, the court held the bill "*good on its face substantially*," and *overruled the demurrer*, and allowed Vos until the first Monday of October, 1888, to plead or answer to the bill. (Record, p. 72.)

On September 14, 1888, Vos filed a plea to said bill, setting forth the judicial proceedings referred to in said bill and contained in the exhibits "A," "B," "C," and "D," made part thereof (Record, pp. 17 to 58), under which he purchased and acquired title, that he was "a *bona fide* purchaser of said premises for a good and valuable consideration, and without notice or knowledge that the acts and proceedings of said Charles A. Kebler and of the firm of Kebler & Roelker on behalf of said complainants alleged in said bill were unauthorized by said complainants and without their knowledge, or that said complainants did not consent to said sale, or of the alleged fraud on the part of said Kebler;" and that he had no such notice until after May 12, 1888, when said complainants filed their said petition in the Superior Court of Cincinnati. (Record, p. 73.)

On September 27, 1888, the court *overruled said plea*, to which said Vos entered his exception, and was allowed thirty days to answer, which time was on November 26, 1888, extended to December 10, 1888. (Record, pp. 76, 77.)

On December 8, 1888, said Vos filed his answer to said bill. (Record, pp. 77 to 81.)

In this answer Vos admits specifically all the allegations of said bill, except the following, which he denies, to wit: He denies that the said Kebler and Kebler & Roelker had no authority to accept service of summons for said complainants in said *Gugenheim* case. He denies that said complainants had notice or knowledge of their answer and cross-petition in said case filed by said Kebler, or of their answer to the cross-petition of Wm. Stix filed therein by said Kebler, or that said Kebler was not authorized to file the same. He denies that said Robb and Strong, trustees, did not consent that said premises should be sold free from their claim and title thereto, or that said claim and title should be transferred to or reserved in the proceeds of sale to be made under said decree, or that said Kebler and Kebler & Roelker had no authority to make or give such consent for them. He denies that said complainants had no knowledge of the order of distribution of the proceeds of said sale made in said cause, or of the payment of said sum of $11,361.65 to said Kebler, or that said Kebler was not authorized to receive said sum, or that the order of court directing such payment was null and void. He denies that said Kebler was wholly insolvent at all times mentioned in said bill. He denies that prior or at the time of his purchase of said premises he knew complainants were absent from the State of Ohio, or non-residents of said state during the time of said proceedings. He denies that the proceedings and acts taken and done in said cause purporting to be on behalf of said complainants were without their authority, notice, or knowledge,

or that they were done solely by fraud of said Kebler, or that they were ignorant of said suit and the proceedings therein and of the receipt of said money by said Kebler until after his death. He denies that the said decree in said cause was null and void as to said complainants, or that the said Court of Common Pleas was without jurisdiction to order the said premises sold free from their claim and title, or that said sale and conveyance to him by said Tylor were null and void. He dies that no rent had been paid under said lease since February 5, 1886, or that there was due and unpaid rent since that date at the rate of $600.00 per annum, or that said complainants had any lien on said premises therefor.

Of the truth of the charge in said bill, that the said Kebler embezzled and appropriated said sum of $11,361.65 to his own use, and that said complainants received no part of the same, or of the charge therein that said Loth was insolvent, this defendant avers that he had no knowledge and did not admit the same.

Admitting that he had failed and refused to perform any of the covenants and conditions of said lease as charged in said bill, he avers that he was under no obligation to perform the same, but that, by virtue of said sale and conveyance to him of the premises so purchased by him and the consideration of $9,100, which he paid therefor, he acquired a perfect title to said premises in fee simple, including all the right, title and interest of both said lessors and said lessee, and free from the claims of all the parties to said suit.

Further answering, said Vos avers that at the time said deed was made by said Loth to said Robb and Strong, trustees, and said lease by them back to him, the transaction was understood and intended to be in fact a *mortgage* to secure an investment then made of $10,000 by said trustees for the purpose of furnishing an income to the said Ellen W. and Mary Robb; that at the same time it was understood and agreed between said trustees and said Kebler, and said Keb-

ler & Roelker, that the said Kebler should have entire charge of said investment and collection of said rent or interest and pay same directly to said Ellen W. and Mary Robb, with full authority to act for said trustees in carrying out said trust in all matters required for the protection and collection of said interest and principal, and in pursuance thereof, that he did, with the knowledge and consent of said trustees, collect interest on said $10,000, paid as rent from February 5, 1885, down to November 1, 1887, and paid the same over to said Ellen W. and Mary Robb.

And, further answering, said Vos avers that any alleged want of authority on the part of said Kebler, or Kebler & Roelker to do any and all of the acts by him or said firm done and in said bill mentioned, was *supplied*, and all such acts purporting to be done on behalf of said complainants, were *ratified* by them as follows: Said complainants, on March 2, 1888, in the Court of Common Pleas of Hamilton county, Ohio, in the case of *William J. Coppock, adm'r*, v. *John Kebler et al.*, No. 79,812, on the docket of said court, voluntarily entered their appearance and filed their answer and cross-petition; and again, on April 10, 1888, in the same court, in the case of *Wm. J. Coppock, adm'r*, v. *John Kebler et al.*, No. 79,902, on the docket of said court, said complainants having, on cross-petition of Frederick G. Roelker, been made parties defendant in said cases, voluntarily entered their appearance and filed their answer and cross-petition in each of said cases, being in the same language, and in each case averring that said Charles A. Kebler, for his firm of Kebler & Roelker, had entered the appearance of said Robb and Strong, trustees, in said action in the bill mentioned, brought by said Gugenheim, and had filed an answer therein on their behalf, and that on May 11, 1887, said firm of Kebler & Roelker had been dissolved, and had been succeeded by the firm of Kebler, Roelker & Jelke, composed of said Kebler and Roelker and Ferdinand Jelke, Jr., and that thereafter all

steps taken in said cause on behalf of said Robb and Strong, trustees, were taken by said new firm; and that in the case aforesaid, brought by said Gugenheim, the premises in the said bill herein described had, pursuant to decree made therein, been sold by George Sidney Tylor, special master commissioner appointed by the court for that purpose, free from the claims of said Robb and Strong, trustees, and all other persons whomsoever; averring further, that the decree had been made in said cause on May 19, 1887, whereby it was ordered, adjudged and decreed, that said special master commissioner should pay to said Robb and Strong, trustees, or their counsel, Kebler, Roelker & Jelke, out of the proceeds of said sale the sum of $11,361.65; and further averring that said sum had been by said special master commissioner, on June 16, 1887, duly paid to said firm, but no portion thereof had by said firm been paid or accounted for to said Robb and Strong, trustees; and further averring, that, on November 23, 1887, said Chas. A. Kebler, had deceased, and that said Roelker & Jelke were the surviving partners of said firm of Kebler, Roelker & Jelke, and praying that said Jelke might be made party defendant to said causes; and that it might be adjudged that said Robb and Strong, trustees, were creditors of said firm of Kebler, Roelker & Jelke; and that the property in the petition and cross-petition of said Roelker sought to be sold might be sold, and that out of the proceeds thereof said sum of $11,361.65, with interest from June 16, 1887, might be paid to said Robb and Strong, trustees; and that said Robb and Strong, trustees, might recover judgment against said Roelker & Jelke, as surviving partners of said Kebler, Roelker & Jelke, for said sum and interest.

And, further answering, said Vos avers that said answers and cross-petitions were sworn to by the said James Hampden Robb, and were signed and filed by the duly authorized attorneys of the said Robb and Strong, trustees, that the same remained on file in said cases until May 16, 1888, when,

said cases having in the meantime been consolidated (April 21, 1888, Record, p. 164), said Robb and Strong, trustees, filed a demurrer to said cross-petition of Frederick G. Roelker on the ground that they had been improperly joined as defendants thereto; and thereafter, until May 28, 1888, when said demurrer was sustained, and said Robb and Strong, trustees, were dismissed from said cases. A copy of said answers and cross-petitions was filed with the answer of said defendant, Wm. Stix, to said bill, to which copy the said Vos makes reference and incorporates said copy in this his answer as part thereof. (For said copy see Record, pp. 65 to 68.)

Said Vos further avers, that at the time of swearing to said answers and cross-petitions and filing them, said Robb and Strong, trustees, had full knowledge of all things and acts done on their behalf by said Kebler, and Kebler & Roelker, and Kebler, Roelker & Jelke, and they deliberately adopted them as done on their behalf and ratified them, and supplied all lack of previous authority upon the part of said Kebler, and Kebler & Roelker, and Kebler, Roelker & Jelke, if any such there previously had been, which he, said Vos, denies. And thereupon said Vos prays to be hence dismissed.

(It may be noted here, that the supplemental answer and cross-petition of said William Stix, filed in the said *Gugenheim* case, and upon which the decree for sale therein was made and referred to in said bill, does not appear in the Record.)

On the same day, December 8, 1888, the said August Vos filed in said Circuit Court and in said cause No. 4,148, his cross-bill against the said James Hampden Robb and Charles E. Strong, trustees, William Stix and Moritz Loth, stating fully the facts alleged in said bill of Robb and Strong, trustees, which were admitted in his answer to said bill; also the facts set forth in his said answer; also averring that on May 24, 1887,

he entered into possession of the premises so purchased and conveyed to him, and has had possession thereof ever since, and has expended a large amount of money thereon in repairs and permanent improvements, which he is ready to show to the court; also referring to the petition hereinbefore mentioned, filed in a cause brought by said Robb and Strong, trustees, May 12, 1888, in the Superior Court of Cincinnati, No. 43,368, removed to said Circuit Court and then on the docket thereof, No. 4,182, in which they averred that the said transactions between them and said Loth—the deed and lease—were in truth and in fact a loan by them to said Loth of $10,000, for which sum and interest thereon they had a first and best lien upon said premises. Reference is made to the certified copy of said petition contained in the transcript of the record in said case 43,368, Superior Court of Cincinnati, on file in said Circuit Court in said case No. 4,182, and the same incorporated therein.

Said Vos prays that, in the event it be found by the court that the said acts done by said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, were unauthorized by and not ratified by and not binding on said Robb and Strong, trustees, and the said judgments, orders, and decrees of said Court of Common Pleas void as to them, and that he acquired no title by his purchase and deed of the said real estate, it shall be decreed that the deed and lease aforesaid constituted only a mortgage to secure to said Robb and Strong, trustees, the payment of said $10,000 and interest, and that an account be taken to ascertain what proportion of said sum and interest ought justly to be borne by him as chargeable against the land covered by said mortgage purchased by him, taking into account the payments which it may be found said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, had made on account of said interest and principal, or out of said sum of $11,361.65, to said Ellen W. Robb and Mary Robb, which proportionate sum that may be so found,

he hereby offers and agrees to pay as said Circuit Court shall direct. (Record, pp. 83 to 93.)

On December 21, 1888, said Robb and Strong, trustees, filed their general replication to the answer of said Vos in No. 4,148. (Record, p. 109.)

On February 16, 1889, said Robb and Strong, trustees, filed their answer to the said cross-bill of August Vos, in which they deny that said Vos was an innocent purchaser for valuable consideration, without notice of the want of authority from the said Kebler, or Kebler & Roelker, or of the want of consent of said Robb and Strong, as trustees, to the decree of sale in the said *Gugenheim* case; and they deny that any of the acts of said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, had been ratified by any act of said Robb and Strong as trustees. As to whether the said transaction, whereby the said Loth conveyed to them said property for $10,000, and they leased the same back to him, was a loan, and whether said conveyance should be regarded as a mortgage, and to be foreclosed as such, they left the same to the determination of the court upon the proof to be made by said August Vos of the allegations of his said cross-bill.

They also deny any authority on the part of said Kebler, or Kebler & Roelker, to collect said rent, or to act for them in the collection of said interest or principal; and they deny that said Kebler collected any of the interest of said $10,000, and paid the same to said Ellen W. Robb and Mary Robb, and if he did so, that he was authorized to collect the said principal. (Record, p. 111.)

On February 23, 1889, said Vos filed a general replication to said answer of Robb and Strong, trustees, to his cross-bill. (Record, p. 117.)

The defendant, William Stix, did not file any demurrer

or special plea to said bill, but otherwise filed pleadings substantially the same as those filed by August Vos.

Thus were the issues made up.

On the final hearing, November 26, 1889, upon the pleadings and evidence, the court found the equity of the case with the defendants, and that the complainants had ratified said Kebler's want of authority, and therefore decreed the dismissal of the bill.

The court further found the title and possession of said Vos good, and decreed the same quieted in him. (Record, p. 175.)

ARGUMENT.

The appellants specify errors relied upon as follows:

1. The dismissal of the bill.
2. The relief granted in the cross-bill of Vos.
3. The ruling of the court that Robb and Strong, trustees, ratified the acts of Kebler.

Error 2, as assigned, is a mistake. The relief granted was not on the *cross-bill of Vos in this case*, but on the *cross-petition of Vos in case* 4,182, consolidated with this case, the prayer of which was to have his title quieted. (Record, pp. 92 and 175; Add. Record, p. 24.)

In the Circuit Court, the bill stood the test of a demurrer, and the plea of innocent purchaser. The court maintained its jurisdiction, but, on the final hearing upon the pleadings and evidence, found for the defendants.

After the rulings on the demurrer and plea, the question of jurisdiction was not further considered. The dismissal of the bill necessarily followed the finding that Robb and Strong,

trustees, had, in fact and law, ratified the acts of Kebler complained of.

This appellee might well rest upon the correctness of the final conclusions of that court. But the whole case is before this Honorable Court on the appeal, and the question of jurisdiction is still in order. Counsel for appellants open their argument with a discussion of that question as raised by the demurrer alone. But the scope of the question is now enlarged, and it will be considered in the light of the whole record.

I.

Had the Circuit Court Jurisdiction?

The complaint is based upon the alleged *nullity* of the decree of the state court in the *Gugenheim* case, on the ground that complainants were not served with process, and their appearance was entered by an attorney without authority. The relief asked is against the *purchasers* under that decree, to have the same declared void, the sale set aside and the title restored to complainants. The proceedings were regular in all other respects, and *presumably* as to the attorney's authority. An issue of fact is raised as to that authority, which is discussed hereinafter in another connection.

But the bill charges that every act of said attorney on behalf of the complainants in said cause was not only without authority, but solely by his "*fraud and mischief.*" The element of fraud thus charged appears to have been the potent factor with the court in overruling the demurrer. The opinion (Record, p. 70) defines the bill as "one attacking the title of the defendants to certain real estate which it is alleged they have procured by a fraudulent judicial proceeding;" and in asserting chancery jurisdiction to prevent the defendants from

relying on such a title, it quotes the following language from Mr. Justice Bradley, in *Johnson* v. *Waters*, 111 U. S. 640, 667: "The court of chancery is always open to hear complaints against fraud, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court, but it will scrutinize the conduct of the *parties*, and if it finds that *they* have been guilty of fraud in obtaining a judgment or decree, it will deprive *them* of the benefit of it and of any inequitable advantage which they have derived under it." (Italics ours.)

We certainly do not question chancery jurisdiction in such a case, for the facts showed the most *flagrant fraud* on the part of the *purchasers*. Through their connivance the sale was a *sham*. So the case of *Shelton* v. *Tiffin*, 6 Howard, 163, much relied upon by appellants (Brief, p. 7), was covered all over with *the fraud of purchaser*, Anderson, and the court animadverted upon it in severe terms.

The remedy in equity applied in that case is not doubted. But those cases and all of that class differ widely from this case and are not authority for this case.

Here the bill does not charge any fraud upon Vos and Stix, the purchasers.

It does not, in any way, implicate them in the fraud of Kebler, or aver that they had any notice thereof, actual or constructive.

Did the *fraud* of Kebler so *taint* the whole proceeding and the title of the *innocent purchaser* as to render a resort to equity the only effectual mode of relief? We do not so understand the law. We can not see that this fraud, not imputed to *any party* to the original suit, nor to the *purchasers*, and only to the *unauthorized attorney*, should cut so important a figure as to call for the intervention of a court of equity. If that feature were eliminated, the esssential fact—the *non-service of process* on the appellants—the entry of their appear-

ance by attorney without authority—would remain. The question of the *nullity* of the decree would survive.

We maintain that the Circuit Court had no jurisdiction:

1. Because there was "*a plain, adequate, and complete remedy at law.*"

This court, in the case of *Whitehead, Trustee*, v. *Shattuc et al.*, 138 U. S. 146, announced the rule that is applicable to the case under consideration. The decision is recent (1891), and since the demurrer was overruled in this case.

The *syllabus is as follows:*

1. An owner in fee, as trustee, of lands in Iowa, has a plain, adequate, and complete remedy at law against one in possession, claiming title under documents which are fraudulent and void; and he need not resort to a court of equity to establish his right or to put him in possession.

2. Where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.

3. By law of congress, suits in equity shall not be sustained in the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.

4. *Holland* v. *Challen*, 110 U. S. 15, and *Reynolds* v. *Crawfordsville First Nat. Bank*, 112 U. S. 405, distinguished.

The suit was one in equity, in the Circuit Court of the United States, to quiet the title of the plaintiff, as trustee of the Des Moines and Ft. Dodge R. R. Co., to land in Iowa. The bill alleged that the plaintiff was the owner in fee of the premises, but held the title as trustee; that the defendants claimed title and were in possession adversely to him; that their claim was founded upon a certain pre-emption claim, certificate of entry from U. S. land office, a patent issued by the United States, and a deed of land, the title to which originally came by grant from the United States to the State of Iowa.

The bill charged the claim and title of defendants were made in fraud of the rights of plaintiff, and that the said evidences of title were procured without legal right, and prayed that the same be canceled, and the title quieted in him. A demurrer was filed to the bill, on the ground, among others, that it showed no ground for equitable relief, but that plaintiff had a plain, speedy, and adequate remedy at law, by ejectment, to recover the land. The demurrer was sustained by the court below, and a decree entered dismissing the bill. From that decree the plaintiff appealed to this court.

Mr. Justice Field, in delivering the opinion of the court, says:

"The facts set forth in the bill of the plaintiff clearly show that he has a plain, adequate and complete remedy at law for the injuries of which he complains. He alleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: that the defendants are in the possession and enjoyment of the property, claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If the owner in fee of the premises, he can establish that fact in an action at law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof.

"The sixteenth section of the Judiciary Act of 1789 (1 Stat. 82) declared 'that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law,' and this provision has been carried into the Revised Statutes, in section 723. The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since

their adoption in the courts of England. The term 'speedy,' as used in the demurrer, is embraced by the term 'complete' in the statute.

"The seventh amendment of the constitution declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned at its discretion to ascertain special facts for its enlightenment.

"*Lewis* v. *Cocks*, 90 U. S. 23 Wall. 466, 470;

"*Killian* v. *Ebbinghaus*, 110 U. S. 568, 573;

"*Buzard* v. *Houston*, 119 U. S. 347, 351.

"And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' *Hipp* v. *Babin*, 60 U. S.; 19 How. 271, 278.

"It would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to another; but this may be said, that where an action is simply for the recovery and possession of specific, real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury.

"What we have thus said will be sufficient to dispose of this case, but such consideration is due to the arguments of counsel founded upon the statutes of Iowa, and the principle supposed to have been established by this court in the decision of the case of *Holland* v. *Challen*, 110 U. S. 15, upon which the plaintiff relies."

The judgment below was affirmed.

It will be observed that the plaintiff in that case sought in equity to establish his title, which he held as trustee to specific real property, as against the title claimed by the defendants on the ground that the evidences of the latter were *fraudulent and void.* It does not appear that the defendants were charged as parties to the fraud.

So, in our case, the complainants seek to establish their title, held by them as trustees, to specific real property, as against the title of defendants acquired by purchase through judicial proceeding alleged to be *fraudulent and void.* Are not the cases essentially analogous? In each case the defendants were in possession of the land under fee simple title.

It is insufficient for our learned adversaries to say, as they do on page 15 of their brief:

"In the present case we had no adequate, plain, practical or prompt legal remedy; none that is the equivalent of what we might have in equity. We could not maintain ejectment, because we are not entitled to possession of the lands, they being subject to the life estate. Under the decretal sale, the interest of Loth in this lease passed to Vos and Stix, and they are the owners of that life estate. *Sutliff* v. *Atwood*, 15 Ohio St. 18 (par. 1 of syllabus)."

What passed "under the decretal sale" to Vos and Stix was what the decree ordered to be sold, and was sold—"*the fee-simple title of the premises*" (Record, pp. 41, 43, 47, 55), and they took possession of the lands by virtue of the title thus acquired, freed from the claims of all parties to the suit.

(We do not consider here the question of the *consent* to the decree, or Kebler's authority.)

The interest of Loth in the lease was not sold as such, but merged, under the terms of the decree, into the fee-simple title sold. There was *no life estate in fact.* The original transaction was a loan of $10,000 at six per cent interest, secured in the form of the deed and lease. This fact has never been seriously questioned by the appellants. This is shown further along, but we may say here, that it was charged in the cross-bills of appellees (Record, pp. 91, 92, 103), and was not denied in appellants' answers thereto, but left to the determination of the court upon the proof to be made by the appellees (Record, pp. 113, 116). The proof was made, a part of which was the petition of said Robb and Strong, trustees, against said Vos and Stix, filed in the Superior Court of Cincinnati, May 12, 1888, in which they averred, that the transactions between them and said Loth "*were in truth and in fact a loan*" by them to him of $10,000 at six per cent interest, for which they had the first lien on said premises, and asked for sale of same to satisfy said lien (Add. Record, pp. 17–20). And said loan was further proven by the testimony of said Loth (Record, p. 151). It was simply an investment of money in the hands of said trustees to produce an income for certain parties in pursuance of an agreement set forth in Additional Record, pages 1–3. The deed and lease constituted the security as a mortgage, the lease stipulating the amount, the mode of payment of the interest, in shape of rent, and the conditions of default.

If this mortgage had been foreclosed as contemplated in the said Superior Court case, where would have been that "life estate" referred to? *Gone.* The trustees, realizing the money from the sale, would simply have re-invested it for the benefit of their *cestuis que trustent.*

The case of *Sutliff* v. *Atwood*, cited, where a leasehold estate was sold on execution, has no application here. But

our learned opponents say that they "could not maintain ejectment because they were not entitled to possession of the lands, they being subject to the life estate."

Whether the transaction be viewed either as a lease or mortgage, under the conditions of default stipulated therein, the trustees *were entitled to possession* of said lands when they filed their bill, provided, of course, the judicial sale to Vos and Stix was void, as they claim. In the bill they allege default on the part of the lessee in the non-payment of rent since February 5, 1886, and impliedly in failing to keep the improvements insured. (Record, pp, 10, 12.)

The lease provided, among other things, for the payment of $600 annually, in half-yearly installments, and for insurance in the sum of $5,000, and conditioned, that if said lessee should, among other things, fail to make said payments as they accrued, "or within thirty days thereafter and without demand made therefor," or should fail to keep any of their covenants in the lease, "it shall be lawful, immediately after such default or breach of covenant, for the said parties of the first part and the survivors of them, and the heirs and assigns of them and the survivor of them into said premises to re-enter, and the same to have again, re-possess, and enjoy as in their first and former estate, and thereupon this lease and every thing contained therein by the said parties of the first part to be done shall cease and determine on their part and at their option." (Record, pp. 51–55.)

In the answer of said Robb and Strong, trustees (by Kebler & Roelker as their attorneys), to the cross-petition of William Stix in the said *Gugenheim* case, under which the property was sold, filed July 24, 1886, they alleged that said Loth had failed to pay the rental due on February 1, 1886, and the same was due and unpaid; that they were entitled to have the premises sold for payment thereof, and asked for sale of the fee-simple of the premises, and they be repaid the $10,000 coming due them upon said sale, the $300 due on

February 1, 1886, and interest on said $10,000 from that date. (Record, p. 36.)

And in their petition in the Superior Court case hereinbefore mentioned, wherein they proceeded on the theory that said deed and lease were a mortgage, they claimed due $10,000, and interest thereon from January 1, 1885, at six per cent per annum." (Additional Record, p. 20.)

By the way, the trustees having filed that petition after full knowledge of Kebler's "*unauthorized*" acts on their behalf, seem to have taken the same view of the original transaction as Kebler did in filing their said answer to Stix's cross-petition in the *Gugenheim* case, for the relief asked was the same, the sale of the *premises* (not the *leasehold estate*)—the fee-simple title—to pay the $10,000 and interest due. *The lease features were ignored.* Surely, the trustees indicated thereby what they would have *authorized* Kebler to do, had they been informed, when said answer was filed. They would have instructed him to do precisely what he did do; at least the inference is very strong that way. Did they not substantially *affirm* Kebler's act not only in filing that answer, but in *consenting* in the decree to the sale of the fee-simple title of the premises, which their learned counsel designate as "the crime in the case?"

Coming back to the point—*the trustees' right to possession*—it is clear that that right accrued to them immediately Loth was in default, as we have shown, under the conditions of the lease; and such was the *status* when they filed their bill in this case, if the lease was still in force, as they claim it was.

It follows that the appellants could have maintained *ejectment*. That was "a plain, adequate and complete remedy at law." The action could have been brought either in the Circuit Court below, if the federal court had jurisdiction at all, or in a state court of competent jurisdiction.

Our learned adversaries conjure up the spectacle of "a

multiplicity of actions" for recovery of rent, and deplore the "uncertainty in point of result," and assert that "none of these actions at law would restore the appellants to their title to the property." That is exactly what the action of ejectment *would do*, establish the title, and, if it belonged to appellants, restore it to them. All the issues as to the title and fraud could be tried in that action, and the defendants would not be deprived of their "*constitutional right to a trial by jury.*" We submit that the case is fully within the decision in *Whitehead, trustee*, v. *Shattuck, supra*, and we repeat a few of the apt and significant words thereof: "*If the owner in fee of the premises, he can establish that fact in an action at law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof.*" (Italics ours.)

So this case is purely a contest as to title to real property and right to its possession and enjoyment. Appellants seek to break down appellee's title by showing fraud in the judicial proceedings under which they obtained it. All of which may be established in an action at law, with the right of a trial by jury by either party. The fact that the alleged fraud resolves itself into a question of fact as to service of process and the authority of an attorney, only emphasizes the case as one properly at law. There are no "*particular elements*" to be considered that should take this controversy into a court of equity.

The case of *Killain et al, trustees*, v. *Ebbinghaus, trustee*, 110 U. S. 568, 573, was one in which there was a contest between two sets of claimants, as trustees of churches, to real property, and to rents and profits arising from it. *Ebbinghaus*, a third, party, appointed trustee for one of the churches by the Supreme Court of the District of Columbia, filed a bill, setting up title in himself for benefit of one of the sets of claimants, who were not in possession, and seeking relief

against the other, who were in possession. The court held that the bill could not be entertained, being "that of a party out of possession claiming the legal title to real estate, seeking to oust the parties in possession, who also claim the legal title, and compel them to pay over the rents and profits." It seems that the claim of appellant's, that *the element of trust*, wherever it exists, always confers jurisdiction in equity, is too broad.

The case of *Lewis* v. *Cocks*, 90 U. S. 23 Wall. 466, 470, was a bill to set aside a judicial sale, alleging the *nullity* of the judgment, under which the premises were sold, by reason of the *non-service of the original process* in the suit upon the defendant. There was also *fraud* charged relating to the sale of the property on the part of one Izzard, the *purchaser*, who was made a party defendant, but Lewis afterward substituted in his place, he having become vested with Izzard's title; but the court found this charge unsustained by the proof. On the question as to the *non-service of process*, this court held, that an action of ejectment was an adequate remedy, and said:

"The questions touching the service of the process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review, they can be better presented by bills of exception and a writ of error than by depositions and other testimony and an appeal in equity."

"It is the universal practice of courts of equity to dismiss the bill, if it be grounded upon a merely legal title. In such cases, the adverse party has a constitutional right to a trial by jury."

In *Metcalf* v. *Williams*, 104 U. S. 93, the court say: "When a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief."

The court give as one reason for the disuse of the former

practice of resorting to equity in such cases—*the dislike of courts to interfere with the proceedings of other courts.*

We refer also to:

Buzard v. *Houston*, 119 U. S. 347, 351.

Hipp v. *Babin*, 60 U. S.; 19 How. 271, 278.

Additional authority on the point that the remedy is at law (brief p. 25):

Smyth v. *The N. O. Canal Co.*, 141 U. S. 656.

We have heretofore pointed out the important fact in the case last named, that the sale complained of was *steeped in fraud* on the part of the *purchaser.*

And yet, what was there in the Iowa case that did not come within the rule laid down by this court in the case of *Whitehead, Trustee*, v. *Shattuc*, *supra*, and in the cases cited therein? The plaintiff, as the owner in fee, sought to recover specific real property from the party in possession, whose title, it was claimed, rested on fraud in a judicial proceeding. He had a complete remedy at law by the ordinary action of ejectment.

2. The appellants had a direct and efficient remedy under the laws of Ohio, and in the very court in which the *Gugenheim* suit was brought, or in the Superior Court of Cincinnati, both courts of competent jurisdiction. And their learned counsel at first proceeded on that theory, when they filed their petition in the latter court, May 12, 1888. (Add. Record, 17.)

They could have brought their action to recover the

property (a substitute in the Ohio code for the action of ejectment), under § 5781 of the Revised Statutes of Ohio, which is as follows:

"§ 5781. (*Action to recover possession of real estate; petition.*) In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same as required by § 5095, and that the defendant unlawfully keeps him out of the possession; and it shall not be necessary to state how the plaintiff's estate or ownership is derived."

The defense to such action is provided for by the following section of said statutes:

"§ 5782. (*Answer.*) It shall be sufficient, in such action, if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted, and when he does not defend for the whole premises, the answer shall describe the particular part for which defense is made, and the defendant may further set forth in his answer such other and further grounds of defense, counter-claim and set-off, as he has or might have in any form of action, whether they are such as have heretofore been denominated legal or equitable, or both."

As is well known, under the Ohio code, there is but one form of action. (§ 4971.) The leading object of this is to avoid circuity and multiplicity of suits (20 Ohio St. 38, 54); and the court is to be regarded as a court of law or equity, and the petition a declaration or a bill in chancery, according to the nature of the case. (11 Ohio St. 626, 635.)

In the action for recovery under the foregoing statutes, the whole controversy as to the title and the right of possession could have been tried and determined, and the respective rights of all parties interested settled and enforced.

II.

August Vos was a *bona fide* purchaser for value without notice, and acquired an unimpeachable title.

1. He had no *actual notice* of the alleged want of authority or fraud.

The bill does not charge him with such notice. It is not insisted that he had, and the evidence is that he had not.

(His depos., Record, p. 147.)

2. He did not have *constructive notice.*

The record does not disclose a state of facts sufficient to charge him with such notice. It is not claimed by our learned adversaries that it does. Their only contention on this point is (under the head of *ratification*) that Vos had notice of the trust in the deed and lease mentioned, and the power of the trustees. (Brief, 28–32.)

This matter is considered hereafter under the same head.

The rule of constructive notice, as applied to *bona fide* purchasers for value at a judicial sale, imposes no more than *a reasonable degree of diligence* in examination of the title—such as a person of ordinary prudence would exercise. The legal inference of notice must be so strong and clear as to be conclusive.

Story's Com. on Equity, §§ 399, 403.
High on Inj., § 378.
Reeder v. *Barr*, 4 Ohio, 458.
Woodworth v. *Paige*, 5 Ohio St. 70.

The last case states the rule as follows: "If there is no fraudulent turning away from a knowledge of the facts which the *res gestæ* would suggest to a prudent mind; if mere want

of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to a purchaser, then the doctrine of constructive notice will not apply. Then the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice."

The cases are numerous that substantially recognize the same rule.

Hall v. *Livingston*, 3 Del. Chy. 348, puts it in this way:

"Notice must be such as would excite the suspicion of a cautious man, but so clear that he could not take and hold the property without fraud."

We submit that Vos had no reasonable ground to suspect any fraud, or that the law firm of Kebler & Roelker had no authority to appear for Robb and Strong. They were practicing lawyers, in Hamilton county, Ohio, and the firm had a good reputation. They accepted service of summons for said Robb and Strong, trustees, and William Stix, as their attorneys, "*duly authorized thereto.*" There was no more reason, apparently, to question their authority to represent Robb and Strong, than Stix, for whom, it is admitted, they had power to appear. All were non-residents, and it was common practice, in such cases, under the statutes (Rev. Statutes of Ohio, §§ 5043 and 5109) and the rules of court, for attorneys to accept service and verify pleadings. The decree purported to be with the consent of the said Robb and Strong, trustees, accepted by the court. At the sale, Kebler told Vos that "he represented said Robb and Strong, trustees," and that "the property was to be free, clear and unincumbered," the latter statement being also announced by the master commissioner.

(Vos' depos., Record, p. 145).

Voss also employed an attorney, Mr. Goodman, to examine the title, who reported "that your title thereto will be all right under the sale." Surely he exercised a reasonable degree of diligence and prudence.

A purchaser at judicial sale can hardly be chargeable with notice as to the authority of an attorney to appear for a party to the suit, when such authority is accepted by the court, and "Courts act on the presumption that the attorney is authorized by the party, and it is in virtue of this authority that he is permitted to appear and prosecute, or defend, not merely because he is an officer of court, admitted by them, and sworn to discharge his duty." *Critchfield* v. *Porter*, 3 Ohio, 518.

And quoting from *Harshey* v. *Blackmarr*, *supra*, p. 171: "Although an attorney can not, without special authority, admit service of jurisdictional process upon his client, yet it will be presumed in all collateral proceedings, and perhaps on appeal or in error, that a regular attorney at law who appears for a defendant, though not served, had authority to do so."

The court had jurisdiction of the subject-matter, and, at least, assumed to have jurisdiction over the persons of Robb and Strong, trustees, which it had the power to determine. It is to be presumed that it acted upon evidence of the facts necessary to give it jurisdiction. The decree is an adjudication to that effect.

Was not Vos justified in presuming that this jurisdiction existed in fact? Was he bound to inquire of the court as to its power to enter the decree? That would have been exacting of him unusual and extraordinary diligence.

In Cooley's Const. Law, p. 502, is the following:

"It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in the records to show it or not."

See also

Grignon v. *Astor*, 2 How. 319.
Voorhees v. *Jackson*, 10 Pet. 472.
Davis v. *Gaines*, 104 U. S. 386.

In the last case, it was held that the order of sale is an adjudication that all the facts necessary to give the court jurisdiction existed.

So August Vos was not required to look beyond the decree of sale, which showed that the court had jurisdiction of appellants.

We do not dispute the power of this court to interpose and prevent *a party who obtained a judgment in a state court by fraud from deriving an advantage from it.* That was the extent of the case of *Johnson* v. *Waters*, 111 U. S. 640, 667. Besides, in that case, the purchasers were implicated in the fraud—indeed, instigated it.

But we are considering the case of a *bona fide* purchaser, not in any way implicated in the fraud, and whether he is chargeable with constructive notice of it.

We claim that, upon the record and the authorities, Vos is not chargeable, unless the general policy of the law requires it, notwithstanding his strong case of equity.

3. But the policy of the law favors innocent purchasers.

"Equity will not disarm such a purchaser, but will act upon the wise policy of the common law, to protect and quiet lawful possessions, and strengthen such titles."

Story's Eq., § 411.

In *Voorhees* v. *Jackson*, 10 Pet. 476, the court say:

"The principles which must govern this and all other sales by judicial process are general ones adopted for the security of titles, the repose of possession, and the enjoyment of property by innocent purchasers, who are the favorites of the law in every court and by every code."

Sugden on Vendors, 1015, says:

"A court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a

man who has purchased for a valuable consideration *bona fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of a court of equity." (Refers to 1 John. Chy. 299; 1 Daniel Ch. Pr. 636, in notes.)

Protection is extended to such a purchaser, even in "cases in which his title is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence."

4. The policy of protecting this class of purchasers is indicated by statutes in different states passed expressly for that purpose.

In Ohio, for instance, there is the following statutory provision, which was in existence at the time of Vos' purchase:

"§ 5356 (Rev. Stat. of Ohio). The title to any property which is the subject of the judgment or order sought to be opened, and which, by or in consequence of the judgment or order, has passed to a purchaser in good faith, shall not be affected by any proceedings under the two preceding sections; nor shall the title to any property sold before judgment under an attachment be affected by said sections."

The two preceding sections referred to (5354 and 5355), specify the causes for which the court "may vacate or modify its own judgment or order, after the term at which the same was made;" among which causes are the following:

"3. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order."

"4. For fraud practiced by the successful party in obtaining judgment or order."

The mode provided for vacating the judgment is, by *motion* (§ 5357), or by *petition* (§ 5358). A trial on the merits

shall be had (§§ 5359–5360), and the parties are entitled to a trial by jury.

Watson v. *Payne*, 25 Ohio St. 340.
Frazier v. *Williams*, 24 Ohio St. 625.
Critchfield v. *Porter*, 3 Ohio, 518.

According to these cases the remedy is complete at law, in the court that rendered the judgment, where the same was *irregularly obtained by appearance entered for defendant by an attorney without authority.*

The decree under which sale is made may be reversed for fraud practiced by the party obtaining it, and yet this statute (§ 5356) will not permit the title of the purchaser in good faith to be affected by such reversal.

5. Under the law and decisions in Ohio, the title of Vos is not impeachable *collaterally* in any court of this state.

The Supreme Court of Ohio has construed the statutes as to the service of process, where the question of jurisdiction was raised, and the affect upon judgments when collaterally attacked. The cases are numerous, and they are to the effect, that the judgment of a court of general jurisdiction, can not be collaterally impeached, where it appears, from the record, that the court has found the facts upon which its jurisdiction legally rests, or where the record is silent on the subject. That evidence will not be received to contradict the finding of such court where jurisdiction is shown, or must be presumed.

Critchfield v. *Porter, supra.*
Pillsbury v. *Dugan*, 9 Ohio, 117.
Morgan v. *Burnet*, 18 Ohio, 321, 323, 535, 546.
Reynolds v. *Stansbury*, 20 Ohio, 344.
Richards v *Skiff*, 8 Ohio St. 586.
Callen v. *Ellison*, 13 Ohio St. 446.
Hammond v. *Davenport*, 16 Ohio St. 178.

In the last case Judge Gholson considers the question at length, and his decision, we think, is very pertinent to this case. (The chancery act, § 60, therein referred to was substantially the same as §§ 5355 and §§ 5356 Rev. Stat. of Ohio above mentioned.)

In our case, the decree on its face was entered by *consent* of the parties. The court assumed to have jurisdiction.

6. The federal courts follow the construction of state courts upon questions of practice in state courts, state statutes that are constitutional, rules of property, etc. Principles of *comity* and *public policy* require it.

"A state judgment can not be impeached collaterally in the courts of the United States, any more than in those of the state, by showing that if due effect had been given to the laws it would have been the other way. The courts of the United States must give it the same effect as a judgment that it has in the courts of the state."

Chicago & A. R. R. Co. v. *Wiggins Ferry Co.*, 108 U. S. 18.

"Whatever is conclusive of the title to land in the courts of a state, is equally conclusive in the federal courts."

Blanchard v. *Brown*, 3 Wall. 245.

7. In the application of this rule, a distinction is taken between *domestic* and *foreign* judgments. In case of the latter, the jurisdiction may be attacked.

We submit that a federal court sitting within the *territorial jurisdiction* of a state court, although created by a different sovereignty, is not a *foreign* court within the meaning of the rule referred to, and will not, therefore, undertake to annul the judgment of such state court, or interfere with its enforcement by injunction.

As conclusive on this point, see—

Freeman on Judgments, § 578.

Story on Conflict of Laws, § 609 and note (8th ed).
Thomson v. *County of Lee*, 22 Iowa, 206.
Smith v. *Atlantic Mut. Fire Ins. Co.*, 2 Foster (N. H.), 21, and other cases cited therein.

In the Iowa case, Judge Dillon says:

"The Circuit Courts of the United States are not to be regarded in the light of foreign tribunals by state courts."

See also *D'Arcy* v. *Ketchum*, 11 How. 165.

In that case, it was held that the defendant may defend on the ground that he was *not served*, in a suit on a *foreign* judgment, but not in a suit on a *domestic* judgment.

It follows that this bill, which attacks the validity of a judgment of a state court of general jurisdiction, for *want of service*, can not be maintained.

That judgment is a *domestic* judgment, and being valid, until reversed by the court that rendered it, or on error or appeal, in all courts of Ohio, it must be so treated by this Circuit Court sitting within the same *territorial jurisdiction*.

As before stated, the statute of Ohio protects the innocent purchaser, even against reversal of the judgment.

8. "A judicial sale and title acquired thereunder, under proceedings of a court of competent jurisdiction, can not be questioned collaterally, *except for fraud in which the purchaser is participant*." (Italics ours.)

Lessee of Grignon et al. v. *Astor et al.*, 2 How. 319.
Griffith et al. v. *Bogert et al.*, 18 How. 158.
Landes v. *Brant*, 10 How. 348.

All these, actions in ejectment.

2 How. 319:

Defendant claimed title under purchaser at judicial sale by order of the County Court of Michigan.

"It was for that court to decide upon the existence of the facts which gave jurisdiction, and the exercise of the jurisdiction warrants the presumption that the facts which were necessary to be proved were proved."

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. (6 Peters, 729.) *A purchaser under it is not bound to look beyond the decree.*" (Italics ours.)

18 How. 158:

Defendant claimed title under purchaser at judicial sale by order of the court in Missouri.

The principle at the beginning of this head is quoted from the decision in this case, and the court speak of it "as the well known and established rule of law in Missouri and elsewhere." Cite 9 Wis. 722; 12 Mo. 239; 16 Mo. 68; 17 Mo. 71.

10 How. 348:

This involved a question as to the validity of a judgment in the District Court at St. Louis under which there was a sale of real estate upon execution.

The defendant *was not served with process.* The record showed "that the parties appeared by their attorneys."

The court say:

"This suit in ejectment is collateral to the judgment; and it can not be impeached collaterally. So the Supreme Court of Missouri held in 1848, in the case of *Landes* v.

Perkins, 12 Mo. 254, on the same title and a similar record in all respects to that before us, and with the views there expressed we entirely concur."

The case of *Lewis* v. *Cocks*, 23 Wall. 466, the court held:

"A bill to set aside a judicial sale, which alleges only the nullity of the judgment under which the premises were sold, by reason of the non-service of the original process in the suit upon the defendant, can not be sustained."

"In such cases, except there be fraud" (which must certainly mean fraud implicating the purchaser), "there is a plain and adequate remedy at law and a court of equity will not interfere. An action of ejectment is an adequate remedy."

In that case the fraud charged related to *fraud* of the *purchaser* in the sale of the property, and not as to the *process;* but the charge of fraud not being sustained by the proof, the court consider the question of relief in equity on the ground of *non-service* of process.

In this case, *Vos*, the purchaser, is not charged with fraud, and not being chargeable with constructive notice of the fraud alleged against the attorneys as to the process, as we claim, the question of relief in equity on the ground of nullity of the judgment for non-service of process, is covered by the above case in 23 Wall. 466.

The case of *Thompson* v. *Whitman*, 18 Wall. 457 (21:897), decides that "the record of a judgment in another state may be contradicted as to the facts necessary to give the court jurisdiction."

This simply goes to the extent that a judgment may be attacked in a collateral proceeding for want of jurisdiction, in a *foreign court;* that is, in *another state.*

This case does not involve the question raised here: Can the title of a *bona fide* purchaser for value without notice be collaterally impeached, especially in a domestic court?

9. The defendant being a *bona fide* purchaser without notice, actual or constructive, he acquired what he undertook

to purchase, and believed he purchased, and paid for as such, *the fee simple title*, free from the claims of all parties to the suit, and is in possession.

His *legal title*, therefore, becomes a part of his defense. And his equitable right to be protected in such title would seem to be beyond question.

Although the complainants claim the *legal title* under a deed, yet that deed is coupled with a lease back containing a contract to re-convey at a certain time upon payment of the purchase money. The transaction, as we have shown, was a loan, with security taken in that form instead of a mortgage.

To entitle them to the protection of a court of equity, as against this defendant, they must show a *superior* right to equitable relief. 7 Pet. 608.

If the equities are equal, "the court will not interfere to change or affect the legal title or the rights of the parties at law."

Adams Equity, 159.
High on Inj., § 420.
Ankelel v. *Converse*, 17 Ohio St. 11.

In such case a court of equity will leave the parties where it finds them.

III.

There was another question of jurisdiction raised in the court below, on motion of August Vos, to remand cause 4,182 (afterward consolidated with this) to the Superior Court of Cincinnati. The statement of the case gives the facts. The motion was overruled and exception taken. That cause was begun May 12, 1888, which was before the bill was filed in this case. The petition in the former covered substantially the facts subsequently embodied in the bill, but treated the transaction between appellants and said

Loth as a loan, and as due, and sought to sell the premises to pay it.

Vos was made a party defendant, and on June 7, 1888, filed his answer and cross-petition, in which he claimed a valid title by virtue of the sale to him in the *Gugenheim* case, and asked the same to be quieted in him.

On the next day (June 8, 1888), appellants dismissed their petition, but could not, of course, dismiss the action on Vos' cross-petition. They remained as defendants to that. They then, on petition, procured a removal of the cause on said cross-petition to the Circuit Court in and for the Southern District of Ohio. (Add. Record, pp. 17–28.) In that court, Vos moved to remand the cause to the Superior Court, on the ground that the court had no jurisdiction.

The grounds were:

1. The plaintiffs chose their forum in the state court.

2. The parties were all non-residents and non-citizens of Ohio, although residents and citizens of different state. (This was alleged in the petition for removal.)

3. The cause was not removable under the act of congress, March 3, 1887.

4. Nor removable under section 8 of the act of March 3, 1875, which was not repealed by the act of 1887.

5. The reason for removal did not exist in that case, and therefore the statute made no provision for it.

The statutes referred to are the United States Statutes at large:

Act of March 3, 1875, in Vol. 18, p. 470, part 3.
Act of March 3, 1887, in Vol. 24, p. 552.

We undertook to maintain the proposition that, under the act of March 3, 1887, *where all the parties are non-residents and non-citizens of the state in which suit is brought, the cause is not removable to the federal court.* We cite the authorities relied on without comment:

Spear's Removal of Causes, 10.
Gibson v. *Bruce*, 108 U. S. 561.
County of Yuba v. *Mining Co.*, 32 Fed. Rep. 183.
Read v. *Read*, 31 Fed. Rep. 49.
Fales v. *R. R. Co.*, 32 Fed. Rep. 673.
Gavin v. *Vance*, 33 Fed. Rep. 84.
Wilson v. *Tel. Co.*, 34 Fed. Rep. 561.
St. Louis R. R. v. *Terre Haute R. R. Co.*, 33 Fed. Rep. 385.
McNeal Pipe Co. v. *Howland*, 5 S. E. Rep. 745.
Western U. Tel. Co. v. *Brown*, 32 Fed. Rep. 337.

Additional authorities on the point that the suit was not brought in the district of the residence of either the plaintiffs or the defendants (brief p. 39):

McCormick Harvesting Machine Co. v. *Walthers*, 134 U. S. 41.
Ex parte Shaw, 145 U. S. 444.
Southern Pac. Co. v. *Denton*, 146 U. S. 202.
Central Trust Co. v. *McGeorge*, Advanced Sheets of Opinions of United States Supreme Court, October Term, 1893, No. 6, p. 274. Opinion, January 8, 1894.

timony is insufficient to prove the allegations of the bill against the sworn denial of the answer.

In *Shelton* v. *Tiffin*, 6 Howard, 163, 186, the court said:

"This" (the entry of appearance) "being done by a regular practicing attorney, it affords *prima facie* evidence, at least, of an appearance in the suit by both the defendants. Any individual may waive process and appear voluntarily."

Weeks on Attorneys, p. 427, says:

"Of course, when an appearance has been entered, the claim to deny the authority of the attorney is viewed with disfavor whenever innocent third parties have acquired, or think they have acquired, rights under the judgment or decree."

In the article quoted from by our learned opponents, 5 American Law Register, New Series, 385, at page 396, Judge Dillon says:

"It is admitted, however, that a large degree of sanctity must be attached to the records of courts; that it is incumbent on a party assailing them, on the ground of the want of authority in the attorney to appear, to make out a clear and unmixed case. Public policy requires this in view of the fact that it is easy for one party, especially after the lapse of time, to deny the attorney's authority and difficult for the other party to show the authority even if it existed. The inference from this, however, is not to hold the unauthorized judgment valid, but to require the party assailing it to show clear merits, to take prompt action, and to establish his right by cogent and strong evidence."

The evidence shows that one of the complainants, Charles E. Strong, never "had any thing to do with this trust, except, nominally, to be a trustee" (Record, p. 123). James Hampden Robb was the managing trustee. The only persons who knew whether Robb expressly or tacitly authorized Kebler to enter appearance for the trustees and file an answer and cross-petition for them were Robb and Kebler. Death has sealed Kebler's lips. Robb is the only witness who speaks in denial of Kebler's authority. Kebler died November 23, 1887. At that time the trustees admittedly learned all the facts as to Kebler's acts on their behalf. Did Robb then speak in disavowal of them? He did not hint at such a thing. Not only was there absolute silence as to such claim, but more than three months later, March 2, 1888, Robb and Strong

filed their answer and cross-petition, sworn to by Robb, in the case of *Coppock* v. *Kebler*, No. 79,812, and after another interval of more than a month, on April 10, 1888, filed another answer and cross-petition *totidem verbis* in the case of *Coppock* v. *Kebler*, No. 79,902. These answers and cross-petitions not only fail to hint that Kebler had not been authorized to appear for them, but throughout affirmatively assert his and his firm's acts to have been done on behalf of Robb and Strong. It was not until May 12, 1888, six months after Kebler's death, when they filed their petition in the Superior Court, in case No. 4,182 (Supplemental Record, pp. 17–20), that the claim was first made that Kebler had acted without authority. The language of this petition and that of the answers and cross-petition are at once so similar and dissimilar, the resemblances and differences throw such an instructive light upon the claim of want of authority now set up, that we print these documents in parallel columns.

"And these defendants further say that on said day one Meyer Gugenheim, having recovered by the consideration of this court, a judgment against the said Moritz Loth, brought suit in this court, case No. —— in this court, against the said Moritz Loth, and the defendants and divers other persons, praying among other things, that these defendants may be declared to hold said lands by way of mortgage as security for the said purchase price on said lands of $10,000, and that said lands

"And the plaintiffs further say that on said day one Meyer Gugenheim, having recovered by the consideration of the Court of Common Pleas of Hamilton county, Ohio, a judgment against the said Moritz Loth, brought suit in the said Court of Common Pleas, numbered 74,875, in the said court against the said Moritz Loth and these plaintiffs and divers other persons, praying among other things, that these plaintiffs might be declared to hold said lands by way of mortgage as

might be free from the claim of these defendants and all other persons parties thereto to satisfy the said judgment of the said Meyer Gugenheim and the claims of divers persons therein made defendants.

"And these defendants further say that thereafter, to wit, on the 18th day of December, 1885, Chas. A. Kebler and Frederick G. Roelker, then partners engaged in the practice of law under the firm name and style of Kebler & Roelker, of the City of Cincinnati, *entered the appearance of these defendants* in such cause and filed an answer therein *on behalf of these defendants;* further say thereafter, to wit, upon the 10th day of May, 1887, said firm of Kebler & Roelker was dissolved and Chas A. Kebler, Frederick Roelker, and Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of law in the City of Cincinnati under the firm name and style of Kebler, Roelker & Jelke, as security for the said purchase price of said lands of $10,000, and that the said lands might be sold free from any claims of these plaintiffs and all other persons parties thereto, to satisfy the judgment of the said Meyer Gugenheim and the claims of the divers other persons therein made defendants.

"And these plaintiffs further say that in said cause no summons or other process was ever issued for these plaintiffs (who then were and ever since have been non-residents of Ohio) and no advertisement was ever made for these plaintiffs, and that they had no notice of said proceedings; and these plaintiffs further say that thereafter, to wit, on the 18th day of December, 1885, one Chas. A. Kebler, then engaged in the practice of the law with one Frederick G. Roelker under the firm name and style of Kebler & Roelker in the said City of Cincinnati, did, *without authority* from these plaintiffs, and *without their knowledge*, enter the appearance of these plaintiffs in said case, and did file an

the successors of said firm of Kebler & Roelker, and these defendants say that thereafter all steps in said cause *on behalf of these defendants* were taken by said firm of Kebler, Roelker & Jelke, and by none others; and these defendants further say that such proceedings were afterward had in said cause that the said premises *were sold, free of the claims of these defendants* and of all other persons whoever, by one George Sidney Tylor, who was appointed special master commissioner by this court in said cause for the purpose of making such sale, and such proceedings were thereafter had in said cause that a decree was made in said cause on the 19th day of May, 1887, whereby it was ordered, adjudged and decreed that said George Sidney Tylor, special master commissioner in said cause, pay to *these defendants or their counsels, Kebler, Roelker & Jelke*, out of the proceeds of said sale the sum of $11,361; and these defendants further say that said sum was *duly paid* on the 16th day of June, 1887, to said firm of Kebler, Roelker

answer therein on behalf of these plaintiffs, using for that purpose said firm name of Kebler & Roelker.

"And these plaintiffs further say that thereafter, to wit, prior to the 11th day of May, 1887, the said firm of Kebler & Roelker was dissolved, and the said Chas. A. Kebler, the said Frederick G. Roelker, and one Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of the law in said City of Cincinnati under the firm name and style of Kebler, Roelker & Jelke, as successors to the said firm of Kebler & Roelker; and these plaintiffs further say that thereafter all steps in said cause *purporting* to be on behalf of these plaintiffs were taken in the name of the said firm of Kebler, Roelker & Jelke.

"And these plaintiffs further say that all steps taken in said cause at any time *purporting* to be on behalf of these plaintiffs were taken *without the knowledge* of these plaintiffs and *without any authority* from these plaintiffs; and

& Jelke by said George Sidney Tylor, special master commissioner, as ordered by the decree of said court, and that no portion thereof has been paid to these defendants or accounted for to them, and these defendants further say that since which time, to wit, on the 23d day of November, 1887, Chas. A. Kebler departed this life, and that Frederick G. Roelker and Ferdinand Jelke, Jr., are the surviving partners of said firm. Wherefore these defendants pray that said Ferdinand Jelke, Jr., may be made party defendant hereto, and that it may be adjudged that these defendants are *creditors* of said firm of Kebler, Roelker & Jelke, and that the property in the petition and cross-petition of Frederick G. Roelker sought to be sold may be sold, and that out of the proceeds thereof said sum, $11,361, with interest from the 16th day of June, 1887, may be paid to these defendants, and that these defendants may recover judgment against Frederick G. Roelker and Ferdinand Jelke, Jr., as surviving partthese plaintiffs say that all orders, decrees, and judgments entered in said cause *purport* to have been entered by and with the consent of these plaintiffs, but that the same were entered by the said Kebler, Roelker & Jelke, and *without the knowledge, consent, or authority* of these plaintiffs, and that these plaintiffs had no knowledge of said cause or the institution thereof, or of any proceeding therein, *until December* 2, 1887, being long after the conveyance of said lands to the purchasers thereof, in pursuance of the *pretended* sale made in said case.

"And these plaintiffs further say that such proceedings were had in said cause number 74,375, that the said premises were sold by one George Sidney Tylor, who was appointed special master commissioner by said Court of Common Pleas for the purpose of making said sale of property, and that said special master commissioner *purported* to make said sale free of the claims of these plaintiffs and of all other persons

ners of Kebler, Roelke & Jelke, for said sum of $11,361, with interest from the 16th day of June, 1887, and for their costs."

whatever parties to said cause, and that the said parcels of land were purchased respectively at said sale by the said August Vos purchasing lots numbered 3, 4, and 5, hereinbefore described, of the subdivision of the tract of land on the west side of Vine street 100 feet front and extending back westwardly 132 feet of the same width in front as in rear, and the said Wm. Stix purchasing the other lots hereinbefore described, to wit, all those parts of lots 2, 4, and 5 of block 12 of Findlay and Ludlow subdivision hereinbefore described.

"And these plaintiffs further say, that in said cause numbered 74,375, a decree was made on the 19th day of May, 1887, whereby it was ordered, adjudged, and decreed that the said George Sidney Tylor, special master commissioner in said case, pay to these plaintiffs or to Kebler, Roelker and Jelke, *purporting* to be their attorneys in said cause, out of the proceeds of said sale the sum of $11,361.66.

"And these plaintiffs further say, that thereafter, on

> the 16th day of June, 1887, the said George Sidney Tylor, special master commissioner, as ordered by the decree of said court, but *without the knowledge and consent of these plaintiffs and without their authority*, did pay to the said Kebler, Roelker and Jelke, and the said Kebler, Roelker and Jelke received, the said sum of $11,361.66, and that no portion of the said sum has been received by these plaintiffs or been accounted for to them.
>
> "And these plaintiffs say, that they were never parties to said cause in law or in fact, and that the said sale as to them is null and void."

Kebler was a cousin of Mrs. Robb, wife of the managing trustee. (Rec., p. 129.) Robb had known him for twenty years, since he was quite a young man. (Rec., p. 129.) When his father died, it was at Robb's suggestion that Kebler was chosen as administrator of the estate. (Rec., p. 129.) As such administrator, Kebler was party to the agreement of compromise which produced the money loaned to Loth on the security of the land involved in this suit. (Supplemental Record, pp. 1–3.) Loth borrowed this money from Kebler's father (Rec., p. 148), with whom Kebler was then associated. (Rec., p. 136.) The interest was always collected by Kebler and paid over to Mrs. Robb, the beneficiary of the trust, who

says, James Hampden Robb "always told me whenever I wanted money to go to Mr. Charles Kebler, and whenever I went to him I always got the money."

All these facts make it extremely probable that Kebler was authorized by Robb to appear in the suit, and intensify the strength of the presumption that, being a licensed practitioner and having entered appearance for defendants, he was authorized to do so. Against these facts and this presumption we have the bare denial of Robb, the denial of an interested party, for he is entitled to one-fourth of the trust fund after the death of Ellen N. Robb and Mary Robb (Supplemental Record, p. 3, paragraph 6), a denial first made nearly six months after he knew all that Kebler had done, and after, with such knowledge, he had filed two cross-petitions, to one of which he swore, in which there can not be found a hint of any want of authority in Kebler, but which, on the contrary, throughout treat Kebler's acts as having been done "on behalf" of Robb and Strong.

This is very far from the "clear and unmixed case," the "prompt action," the "cogent and strong evidence," which public policy demands when a defendant, long after he knows judgment has been entered against him, by denial of the attorney's authority to appear for him, seeks to overcome "the sanctity of the records of courts," to the injury of innocent purchasers under the judgment.

The evidence, it is submitted, would not be sufficient to sustain the claim of appellants even in an action at law. But this is a suit in equity. Although the complainants waived verification to the answer of William Stix (Record, p. 68), nevertheless William Stix did verify on oath his amended answer (Record, pp. 106–108), on which the cause was tried.

"A complainant in chancery can not, by waiving a verification on oath to the defendant's answer, deprive such an-

swer, when made with such verification, of its ordinary effect."

Clements v. *Moore*, 6 Wall. 299, syllabus 5.

"Where the answer is responsive to the allegations of the complainant's bill, they must, to entitle him to relief, be sustained by the testimony of two witnesses, or of one witness, corroborated by circumstances which are equivalent in weight to the testimony of another witness."

Vigel v. *Hopp*, 104 U. S. 441.

In the case at bar, the answer is responsive to the allegations of the bill; it denies that "the acts done by Charles A. Kebler and the firm of Kebler & Roelker in said bill mentioned were done without the knowledge or consent of these complainants," and asserts "that they were done with the knowledge and consent and at the request of complainants." (Record, p. 106.)

Robb is not corroborated by another witness, nor by circumstances equivalent in weight to the testimony of another witness. Strong can not be counted as a witness corroborating Robb. Strong simply testifies that he never had any thing to do with the trust, except nominally to be a trustee, and that *he* never gave Kebler any authority. That in no way tends to show that Robb, the managing trustee, did not authorized Kebler to enter appearance in the suit. There is no corroborating circumstance whatever. None can be found in Kebler's alleged concealment of his acts from Roelker. Our opponents (Brief, p. 32) say: "Mr. Roelker, in his cross-petition in the Coppock case (Record, p. 163), expressly disavowed all knowledge of Kebler's connection with the *Gugenheim* case, and every thing contained therein, and alleged that the matter had been concealed from him by Kebler in his lifetime—the concealment covering a period of more than two years of the partnership relation." As a matter of

fact, that is not the language of the cross-petition at all. What Roelker alleged (Record, p. 163) is as follows: "And this defendant further says that Ferdinand Jelke and Herman L. Besuden, John F. Jelke and J. Hampden Robb and Robert F. Strong as trustees, Mary Russell, Elizabeth Sampson, claim to have had dealings with the said Charles A. Kebler, acting and professing to act as a partner of this defendant, whereby the said parties claim that the said partnership and this defendant became indebted to them and each of them; and this defendant says that he does not know and is unable to state the particulars of said transactions; that they were and each of them concealed from this defendant by the said Charles A. Kebler in his lifetime, and this defendant had no knowledge thereof until the death of said Charles A. Kebler."

The *Gugenheim* case is not even mentioned. How can it be claimed that Roelker was alleging that Kebler had concealed from him his want of authority to appear in the *Gugenheim* case, "and this defendant had no knowledge thereof until the death of said Charles A. Kebler," when, at the time Roelker filed this cross-petition, no one had ever set up the claim of such want of authority, and to this very pleading Robb and Strong filed the cross-petitions alleging that Kebler and Roelker had appeared for them, and had acted in their behalf, and that the proceeds of the judicial sale had been duly paid to them, their counsel? Roelker said: "They claim to have had dealings with the said Charles A. Kebler, acting and professing to act as a partner of this defendant." No doubt they did so claim, but the very marrow of their present claim is that they had had *no* dealings with Kebler. Roelker did not disavow knowledge and charge concealment of Kebler's entry of appearance in the case, but of his subsequent embezzlement of the money realized from the sale.

Roelker's disavowal of "all knowledge of Kebler's con-

nection with the *Gugenheim* case," if he had made it (which he did not), a case which was in their office over two years, in which they represented William Stix as well as Robb and Strong; in which young Tylor, an inmate of their office, was appointed master commissioner, and as such, with all the publicity and advertising necessarily involved, sold at auction over thirty thousand dollars worth of real estate—would have been simply incredible. Moreover, whatever construction be put upon the allegations of Roelker's cross-petition, is of no consequence, for, being mere *ex parte* statements by him in another case, they are not, as to any facts stated, evidence at all in this case. And in this connection it is a significant fact that, although Roelker's office was just across the street from the court-room, complainants did not call him as a corroborating witness on the trial.

B.

Ratification.

But, if Kebler originally entered the appearance of Robb and Strong as defendants in the *Gugenheim* case without authority, that authority was supplied, and his acts were ratified by them by filing the two cross-petitions in the Coppock cases.

Various reasons are urged why these answers and cross-petitions should not be held to be a ratification.

It is said the answer and cross-petition "was not a *suit begun* by Robb and Strong, but only a pleading filed in an action in which they had been summoned as defendants *for a limited purpose* by the cross-petition of Frederick G. Roelker;" that their appearance was not voluntary, as they were subject to constructive service by publication, and that "any attempt to prosecute their cross-petition would have been utterly futile and ineffectual, as much so as if the court had had no jurisdiction of the subject;" that "the portals of

that court were barred against them had they wanted to remain."

But it is not true that "the portals of that court were barred against them had they wanted to remain." They obtained leave to withdraw their answer and cross-petition, and then demurred to Roelker's cross-petition on the ground that they were not proper parties defendant to it, and thus got out of the case. No one else objected that they were not proper parties, and all such defects as want of proper parties, misjoinder of defendants, and misjoinder of causes are waived if objection be not made on such ground.

McCarthy v. *Garraghty*, 10 Ohio St. 438.

Roelker's cross-petition (Record, p. 163) said that Robb and Strong were necessary parties to the determination of the right of *himself and Coppock* in the subject-matter of the litigation. But his cross-petition stated no facts showing them to be necessary parties to any such determination, and therefore the demurrer was sustained. But Robb and Strong's own cross-petition did set out facts showing a claim upon the very real estate mortgaged by Kebler to Roelker to indemnify the latter for liability on account of the former's embezzlement and described in Roelker's cross-petition. By their cross-petition Robb and Strong sought to be subrogated to Roelker's rights as mortgagee of the land described in his cross-petition, "by virtue of the right in equity of a crediter to avail himself of any security which his debtor holds from a third person for the payment of the debt." (*Union Life Insurance Co.* v. *Hanford*, 143 U. S. 187, 190.) The prayer of the cross-petition (Record, p. 68) is "that it may be adjudged that these defendants are creditors of said firm of Kebler, Roelker & Jelke, and that the property in the petition and cross-petition of Frederick G. Roelker sought to be sold may be sold, and that out of the proceeds thereof said sum, $11,361, with interest from the 16th day of June, 1887, may

be paid to these defendants;" and also a prayer for personal judgment against Roelker and Jelke as surviving partners. Roelker's cross-petition sought to enforce his mortgage; the subject of his action was the land mortgaged, or the mortgage itself. Robb and Strong's cross-petition was a counterclaim seeking subrogation to that mortgage, asking that that land be sold and the proceeds paid to them. It related to the identical subject which was the subject of Roelker's action.

The Ohio Statutes provide as follows:

"Sec. 5059. *What pleadings allowed.* The only pleadings allowed are:

"1. Petition.

"2. Demurrer.

"3. Answer, which, when affirmative relief is demanded therein, may be styled cross-petition.

"4. Reply."

"Sec. 5071. *Defendant may state different defenses, etc.* The defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off as he has, whether they are such as have been heretofore denominated legal or equitable, or both; he may claim therein relief touching the matters in question in the petition against the plaintiff, *or against other defendants* in the same action, and each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer.

"Sec. 5072. *Counterclaim.* The counterclaim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, *or connected with the subject of the action.*" (51 v. 57, sec. 94; S. & C. 979.)

Robb and Strong's petition was perfectly good; no one did or could object to it. So long as it remained on file it

was a waiver of any defects in Roelker's cross-petition. It was only after withdrawing it pursuant to leave obtained from the court (Record, p. 165) that they could demur to Roelker's cross-petition. All the court decided was that they were not necessary parties to the cause of action stated in Roelker's cross-petition; it never decided that Robb & Strong's cross-petition was not a perfectly proper counterclaim against Roelker. Roelker had not averred the necessary facts to compel them to try their right of subrogation in that suit, but they had a perfect right to come in and try it there. The prayer for personal judgment against Roelker and Jelke was probably improper, and it was doubtless for this reason that Robb and Strong issued no summons against Jelke; but the cross-petition so far as it was for subrogation to Roelker's rights as mortgagee was entirely proper and open to no objection by any party to the cause.

As to Roelker, a summons was not only unnecessary, but would have been "without reason."

In *Brown* v. *Kuhn*, 40 Ohio St., at p. 485, the Supreme Court of Ohio said:

"The statutes regulating pleadings, appeals and proceedings in error in force pending the action below were worded substantially, if not precisely, as the Revised Statutes. Section 5059 authorized a defendant to file an answer asking affirmative relief, to be styled a 'cross-petition.' The only provision for a summons upon a cross-petition is section 5074. Its object is to bring in as a defendant a person not at the time a party to the original action. Moreover, section 5097, fixing rule days for pleadings, directs that an answer to a petition shall be filed on or before the third Saturday 'after the return day of the summons,' while the answer to a cross-petition shall be filed on or before the third Saturday 'after the cross-petition is filed.' These sections imply that no summons is to go out upon a cross-petition except to bring some one into court who is not already there. To summon

those already in court would add materially to the cost of litigation without reason. The cross-petition can ask relief only 'touching the matters in question in the petition.' The same section (5071) that tells what a defendant may set forth in his answer includes the matter of a cross-petition. Every other defendant is warned to examine the court files, after the rule day for answer, for cross-petitions against himself, as fully as is the plaintiff in the action."

To the suggestion that the answers and cross-petitions of Robb and Strong were not suits *begun* by them, but pleadings filed in a suit to which they were defendants not voluntarily appearing, it is sufficient to reply that in so far as they were *answers*, this is true, but in so far as they are cross-petitions asking affirmative relief, Robb and Strong did voluntarily appear as plaintiffs and did *begin* suit.

It is also claimed that Robb and Strong were trustees of realty without power to convert into personalty, and therefore, that they could not ratify Kebler's act in consenting to its sale, because such consent was beyond their own power. If the premises were true, the conclusion might, perhaps, follow. But it is not true. The subject of the trust, which came into the hands of Robb and Strong, was not land, but money. The instrument creating the trust (Supplemental Record, p. 2, par. 4) says: "After paying the same, the remaining *moneys* in his hands and the *proceeds* of the sale of the land aforesaid, or so much as necessary, shall be set apart and invested for two trust funds." Nowhere is it provided that it shall be invested in land. Consequently, the trustees invested it in a mortgage, for the deed from and lease to Loth at a rental precisely equal to six per cent of the amount of the consideration named in the deed, were in equity simply a mortgage. That the property was worth much more than the $10,000 received by Loth, is shown by the fact (Record, p. 43) that it was appraised at $16,696, and sold at forced sale for $12,231. Loth testified that he "would not have

taken $10,000, as a *sale* at the time;" that he wanted to borrow money, and, hearing that Kebler had money to loan, went to him and this transaction resulted; that the deed and lease were part of the same transaction. (Record, p. 149.) The payments of rent were carried on his books as "interest on loan of Robb and Strong." (Record, p. 150.) It was understood between him and Kebler when he got the money "that it was a loan in the form of a lease." (Record, p. 151.) And Robb and Strong perfectly understood that it was merely a mortgage which they held, and in the case in the Superior Court, they began suit to foreclose it. (Supplemental Record, p. 17.) In their petition they said (Supplemental Record, p. 20): "And these plaintiffs further say that the said transactions between them and said Moritz Loth were in truth and in fact a loan by them to the said Moritz Loth of the sum of $10,000, in consideration whereof the said Moritz Loth conveyed to them the premises hereinbefore described, and they executed to the said Moritz Loth the lease hereinbefore described containing the privilege of purchase for the said sum of $10,000; and they say that in consequence thereof they have a first and best *lien* upon the premises in the said sum of $10,000, with interest thereon, and that there is and remains *due* and *unpaid* thereon the sum of $10,000, with interest thereon from January 1, 1885, at *six per cent* per annum. Wherefore the plaintiffs pray that the said claim may be established as a first and best *lien* on the said premises, and that unless the defendants shall pay to them the said sum of $10,000, with interest as aforesaid at a short day to be fixed by the court, that the said premises may be *sold* for the satisfaction of their said claim, and for such other and further relief as they may show themselves to be entitled in equity and good conscience." As stated by our learned adversaries (Brief, p. 4), the petition in the *Gugenheim* case averred that Robb and Strong, trustees, "held the property only as se-

curity, and asked that the court so find." As that was the truth, they themselves, and Kebler as their attorney, were not only authorized but bound to admit it, and had perfect authority to consent to the sale of the land "for the satisfaction of their said claim."

That Kebler's alleged unauthorized entry of appearance was an act capable of ratification admits of no doubt. In *Ryan* v. *Doyle*, 31 Iowa, 53, it was decided that "an unauthorized appearance by an attorney in a case where there has been no personal service on the defendant may be so ratified by payment to the attorney for compensation for his services, as to confirm the jurisdiction and validate the judgment."

Conversely it was decided in *Ancona* v. *Marks*, 7 H. & N. 686, that "a person may ratify an action brought in his name, but without his knowledge or authority, by another professing to act as his agent and on his behalf."

It is equally beyond question, we submit, that the cross-petition of Robb and Strong amounted to a ratification. Their language in terms says that Kebler and Roelker, *as partners*, "*entered the appearance of these defendants* in such cause, and filed an answer therein on *behalf of these defendants.*" They do not say that Kebler, in fraud of Roelker (for a lawyer has no authority as against his own partner wrongfully to sign the firm name to an unauthorized entry of appearance), without their knowledge or consent, *purported to* enter the appearance of these defendants in such cause, and, without such knowledge or consent, filed an answer therein *purporting to be* on behalf of these defendants. So, also, they say that after May 10, 1887, "all steps in said cause *on behalf of these defendants* were taken by the *firm* of Kebler, Roelker & Jelke;" that "such proceedings were afterward had in said cause, that the said premises *were sold free of the claims of these defendants and of all other persons whoever;*" that an order was made in the cause "to pay to these defendants, or *their counsels, Kebler, Roelker & Jelke,* out of the proceeds of said

sale, the sum of $11,361, and these defendants further say that said sum was duly paid on the 16th day of June, 1887, to said firm of Kebler, Roelker & Jelke; that no portion *thereof* has been paid to these defendants or accounted for to them." Wherefore they pray "that it may be adjudged that these defendants are *creditors* of said *firm* of Kebler, Roelker & Jelke," and for subrogation to Roelker's rights as mortgagee. This language, with its reiteration of "on behalf of these defendants;" its statement that the premises had been sold "free of the claims of these defendants and of all other persons whoever;" its speaking of a payment ordered to be made to "their counsels, Kebler, Roelker & Jelke," and of its having been "duly paid" to that firm, but not "accounted for" to them—would be sufficient, if found in the most casual, informal writing, or mere speech of theirs, to show ratification of what had been done in the suit. But when found in so solemn an instrument as a sworn pleading affirming that the premises had been sold "free of their claims," and therefore praying that they should be adjudged creditors for the proceeds "duly paid" to Kebler, Roelker & Jelke, and not accounted for by them, and through subrogation, for foreclosure of Roelker's mortgage, and payment to them of the proceeds of foreclosure, its force as a ratification is irresistible.

It is suggested by our learned adversaries (Brief, p. 35, pp. 57, 58) that common-law pleadings being abolished in Ohio, the character of the action brought by the cross-petitioners is not clear; and it is said (p. 58) that "the prayer that Robb and Strong be adjudged creditors of the firm of Kebler, Roelker & Jelke is perfectly consistent with a claim founded *in tort* upon the wrong done in consenting to a sale through Kebler which despoiled the trustees of this property." The character of the action is clear beyond a peradventure, and the suggestion of counsel is untenable for a twofold reason, either branch of which is conclusive. Even in

Ohio, you can not recover *in tort* without charging a wrongful act in your petition. Robb and Strong would not be permitted to recover damages for a wrong done by Kebler in consenting to a sale, without averring that Kebler had wrongfully consented. The cross-petitions not only do not say that Kebler *wrongfully* consented, they do not even aver any consent by him at all. All they say is that after May 10, 1887, "all steps in said cause *on behalf of these defendants* were taken by said firm of Kebler, Roelker & Jelke, and by none others, and these defendants further say that such proceedings were afterward had in said cause that the said premises were sold free of the claims of these defendants and of all other persons whoever."

And secondly, even in Ohio, if your petition, in tort, *does* charge a wrongful act, you can not recover unless you charge and *prove* that it was done by *defendant*. Waiving the question whether Roelker would be liable for Kebler's alleged torts in entering appearance without authority, or wrongfully consenting to a sale, clear it is that the surviving partners of Kebler, Roelker & Jelke would not be liable for these torts, for, when (if ever) they were committed, there was not and had not yet been any such firm in existence. The entry of appearance, signed Kebler & Roelker, bears date November 19, 1885 (Supplemental Record, p. 4); the consent to the sale of the premises in fee simple is found in the answer filed July 24, 1886, and signed Kebler & Roelker (Record, pp. 36–7); the property was sold April 16, 1887 (Record, p. 42); the firm of Kebler & Roelker was dissolved and the firm of Kebler, Roelker & Jelke was formed May 10, 1887, as stated in the cross-petitions themselves.

The indemnity mortgage to which Robb and Strong sought to be subrogated was given to Roelker, June 23, 1887 (Record, p. 162), the said Kebler & Roelker, "at and before June 23, 1887," being "partners as attorneys at law" (Record, p. 161). It was a deed with an oral defeasance, and was

given, *inter alia*, "to indemnify" Roelker "against any loss that he might sustain or liability that he might be under by reason of the business of said partnership." (Record, p. 168.) Roelker was a man of means; Jelke had nothing but expectations from his father. (Record, p. 139.) The firm of Kebler & Roelker having been dissolved and the firm of Kebler, Roelker & Jelke having been formed as its successor, May 10, 1887, as alleged in the cross-petitions (Record, p. 67), "thereafter all steps in said cause taken on behalf of these defendants were taken by said firm of Kebler, Roelker & Jelke, and by none others." These subsequent steps consisted solely of the receipt of the proceeds of sale pursuant to the decree of confirmation entered May 19, 1887. (Record, p. 49.)

And these facts show that Robb and Strong were not and could not have been suing for Kebler's wrongful entry of appearance or consent to a sale, but were, in affirmance of the appearance and sale, seeking an adjudication that they were creditors of Kebler, Roelker & Jelke for money, the proceeds of the sale, by them had and received as their agents, but not accounted for, and of subrogation to Roelker's mortgage of indemnity against "any liability he might be under by reason of the business of said partnership." Their action was entirely inconsistent with the position they now seek to maintain, of repudiation of Kebler's authority; it was a complete ratification of his acts now claimed to have been unauthorized. We do not even have to invoke the aid of the rule laid down in Story on Agency, § 253, that on the question of ratification "the acts and conduct of the principal are construed liberally in favor of the agent."

In *Merrill* v. *Rokes*, 54 F. R. 450 (Circt. Ct. of Appeals), the second cause of action was "for damages for the negligence of the defendant, as his agent, in failing to collect two promissory notes, which amounted in the aggregate to $1,925, made by one Mooney and payable to the order of the plaintiff." (P. 451.) The defendant's alleged negligence related

to his conduct in reference to certain notes of Taylor and O'Brien, pledged with defendant as collateral security for the Mooney notes. Instead of collecting these Taylor and O'Brien notes, defendant had exchanged them for a stock of goods, which was put in Mooney's charge as trustee.

Litigation ensued, the stock of goods was sold in attachment proceedings, but Mooney finally recovered judgment, and the proceeds thereof yielded defendant $1,820.56, produced by the sale of the stock. All this had involved payment of attorney's fees and expenses by defendant. Plaintiff repudiating defendant's acts as his agent, denying any obligation for the attorney's fees and expenses incurred, sought to recover damages for defendant's negligence. But plaintiff had previously demanded the $1,820.56, claiming it as his. It was held that this demand operated as a ratification of defendant's acts, and barred the present action for negligence. The court, at pp. 454–5, said:

"The plaintiff now insists that he is entitled to recover of the defendant all of this $1,820.56. This is a portion of the proceeds of the Mooney judgment, and the defendant claims that to procure it he was compelled to incur and pay attorneys' fees and other expenses, and that he ought to be permitted to retain out of the proceeds the amounts he so expended. If in procuring the possession of the stock and obtaining the Mooney judgment he necessarily incurred any reasonable expenses and attorneys' fees, and the plaintiff asks to recover of him this money which these attorneys' fees and expenses earned, the defendant is obviously entitled to set off and retain them for his reimbursement. The principal can not take the benefits and repudiate the burdens of his agent's acts. If he ratifies that which favors him, he ratifies the whole. *Gains* v. *Miller*, 111 U. S. 395, 398; 4 Sup. Ct. Rep. 426; Story, Ag., secs. 333, 336; *Skinner* v. *Dayton*, 19 Johns. 513, 554. On July 28, 1890, the plaintiff served on the defendant a written notice, in which he claims

that the Mooney judgment and its proceeds are his, and demands of the defendant 'the said sum of $1,820.56, so received out of the said Mooney judgment, and for all interest accruing for the same, to wit, interest at the rate of ten per cent per annum from January 28, 1888, less all legal claims which you may have against me for attorneys' fees or other costs justly incurred in the litigation connected with my said claim against the said Mooney.' *This demand*, which was urged at the trial, and was the basis of the plaintiff's recovery, *was a ratification* of the acts of the defendant on his principal's behalf up to the sale on January 28, 1888, and left nothing in issue between the parties relative to their transactions prior to that date but the amount of the attorneys' fees and expenses the defendant had incurred in his principal's interest."

In *Ryan* v. *Doyle*, 31 Ia. 53, already referred to, the unauthorized appearance of an attorney for defendant in a case, in which there had been no personal service, was held to have been ratified by payment of compensation to the attorney for his services, so as thereby to confirm jurisdiction and validate the judgment previously invalid.

In *Jones* v. *Atkinson*, 68 Ala. 167, the facts were a little complicated, sufficiently so, it seems, to cause our learned opponents (Brief, pp. 61, 62) curiously to misapprehend the point actually decided.

"The suit was brought by R. W. Atkinson against D. P. Jones to recover one mouse-colored mule named *John*." Trial was had on issue joined on the plea of *non detinet*. "On the trial, as the bill of exceptions shows, it was proved that, in January, 1878, the plaintiff hired or rented a mule which he owned, named *Jerry*, to one, Pritchett, for the year 1878 for $25; that in August of that year, with the knowledge and assent of the plaintiff, Pritchett traded said mule with one Henderson for the mule now sued for (*i. e.*, *John*); that a short time afterward, during the same year, Pritchett

traded said mule (*i. e., John*) with one Lindsey Clanton for a mare, called the Clanton mare, and that Clanton afterward sold or traded said mule (*i. e., John*) to the defendant in this suit." Pritchett afterward traded the Clanton mare for still another mule, but that had nothing to do with the point decided by the Supreme Court. Plaintiff refused to accept the Clanton mare, denied Pritchett's authority to trade *John* for her, and brought suit in trover against Jones, who had possession and claimed ownership of *John*. The question was whether Atkinson had ratified the unauthorized exchange of *John* for the Clanton mare. One witness for defendant testified "that plaintiff had offered to trade the Clanton mare to him while Pritchett had her; and another that plaintiff told him to go and trade with Pritchett for the mare." This was denied by plaintiff. The defendant asked the court below to charge the jury that "if they find that Prichett afterward traded the mule *John* for a certain mare, and while said mare was in possession of Pritchett, plaintiff claimed her as his property and offered to trade her, this was, in law, a ratification of the trade of *John* for the mare, and he can not recover in this suit." The court refused to give this charge, and the defendant excepted to its refusal; and he now assigns said refusal as error.

We have quoted the facts at such length to show that the case did not involve and the court did not decide any such propositions as our learned adversaries (Brief, pp. 61, 62) say the Supreme Court held. The judgment below in plaintiff's favor was reversed for refusal to give the foregoing charge asked by defendant. At pages 169–170, the court said: "Now the only claim Atkinson could have or assert to the mare rested on the title he acquired by the exchange of the mule *John* for her. This claim, if he made it, rests alone on the fact that she stood in the place of the mule *John*. If he claimed the mare, and if he asserted and attempted to exercise acts of ownership over her this was a ratification, and being once

made, he could not revoke it, unless it was made under a misapprehension of the facts. His right and claim to the mare had no foundation to rest on, unless he had parted with right and claim to the mule. He could not claim both, and claiming one he renounced the other."

In *Woodward* v. *Suydam*, 11 Ohio, 360, it was held that:

"Where a commission merchant, from time to time, sends an account of sales to his principal, who makes no objection to the sales, and draws for the balance of the account rendered, it is a ratification of the sale, and the principal can not recover for any alleged violation of his instructions as to the terms of sale."

It does not appear whether the draft for balance of account was paid or not.

Rule 6 of the Rules of the Supreme Court of Ohio provides that:

"A syllabus of the points decided by the court, in each cause, shall be stated in writing by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the facts of the cause that have been determined by the court. And the syllabus shall be submitted to the judges concurring therein for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein."

In *Frank* v. *Jenkins*, 22 Ohio St. 597, which our learned opponents (Brief, p. 51) say is an interesting and well considered case, syllabuses 2 and 3 are as follows:

"2. An action by the owner of goods, to recover their price and value from his agent, who, without proper authority, has consigned them for sale on commission, and received advances upon them, is *prima facie* evidence of a ratification of the consignment.

"3. Goods were consigned by an agent, without proper authority from the owner, for sale on commission by the con-

signees, who, in good fath, advanced money upon them to the agent, supposing him to be the owner of the goods. While the goods were in transit, the owner replevied them from the carrier, and also brought an action against the agent to recover their price and value. In an action of replevin subsequently brought by the consignees against the owner, to recover possession of the goods, it appearing that the owner's said action for their price and value was still pending, and there being no evidence that it was brought or prosecuted under any mistake of the facts: Held, that under the circumstances, the owner was estopped from denying the authority of his agent to make the consignment."

It will be observed that the language is *an* action; the second action for the price brought in Boston, in which an *attachment* issued, is not even referred to in the syllabus. Counsel for Frank in that case argued (p. 600) of the suit in replevin, and the suit for the price, that "the one suit said 'yes' and the other 'no' at the same time; the one act neutralized the other." But the court held the suit for the price to have been nevertheless a ratification.

Our learned adversaries (Brief, p. 53) quote from the opinion of the court (pp. 603–4) the following passage: "It is well settled law that an action by the owner for the price or purchase-money of goods sold by an unauthorized agent may be regarded as, and *prima facie* is, a ratification of the sale." They continue by saying, "Then the court states instances, like those in our case, when such an action would *not* be *prima facie*, or at all, a ratification," quoting language from p. 605. They judiciously skip the "interesting and well considered" remarks on p. 604, immediately following the passage first quoted. The remarks entire are as follows:

"It is well settled law that an action by the owner for the price or purchase-money of goods sold by an unauthorized agent may be regarded, and *prima facie* is, a ratification of the sale.

"The transaction in question was not, strictly speaking, a sale of the cotton, but it was in the nature of a sale, and should be subject to the same rules of law in regard to acts of ratification and disaffirmance by the owner. It was a shipment of the cotton for sale on commission, with an advance of part of the purchase money. It was more than a pledge. It was a pledge with an irrevocable power to sell and reimburse the money advanced and the freight and commission. No reason can be shown why in such a case, equally as in a case of simple sale, the well known rule of law in regard to ratification should not apply.

"The reason which underlies the rule is in both cases the same, namely, *that a third person has an interest in the property, which it is in the power of the owner either to defeat or to ratify at his option.*

"Such third person, as it were, is at the mercy of the owner. Justice, therefore, requires that he should make his election *at once, and adhere to it* when fully and fairly made. If the owner repudiates the sale, the purchaser must seek his remedy against the unauthorized agent. If the sale is ratified by the owner, the purchaser must pretermit his remedies against the agent, and assert his right to the property." (Italics ours.)

In the case at bar Robb and Strong not only did not promptly repudiate Kebler's acts upon full knowledge of all the facts, but for six months thereafter kept silence as to his alleged want of authority, and by their cross-petitions continuously asserted that his action had been "on their behalf," and that they were entitled to the money in the hands of his surviving partners as their money "not accounted for to them."

In this connection the language of this court in the case of *Leather Manufacturers Bank* v. *Morgan*, 117 U. S. 96, 114, 115, is extremely pertinent.

Speaking of the duty of a depositor to use diligence to

discover, and upon discovery, promptly to notify his bank of forgeries committed by his clerk in raising checks signed by the depositor, this court, through Mr. Justice Harlan, at pp. 114, 115, said:

"Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, can not be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, properly sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect to falsify a stated account, to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it."

Here the action is by Robb and Strong to falsify the solemn records of a court to our injury, and our defense is

that they have, by express affirmation, as well as by conduct, ratified the acts of their agent, thereby preventing any steps being taken for redress against the agent for his alleged unauthorized acts.

Nor did the court, in *Frank* v. *Jenkins*, "then state instances, *like those in our case*, when such an action would not be *prima facie*, or at all a ratification." It said, "if either of the actions by Frank was brought under mistake, it was his duty, under the circumstances, promptly to dismiss or abandon it upon discovery of the mistake." In our case Robb and Strong filed their cross-petitions with full knowledge of all the facts. There was absolutely no mistake. They have not since, to this day, learned a fact they did not then know.

In *Wilson* v. *Wilson*, 30 Ohio St. 365, the plaintiff sued defendant before a justice of the peace upon a promissory note made by defendant's wife while sole. Defendant proved a divorce before suit brought, so that judgment went for defendant. Plaintiff appealed to the Common Pleas, and there filed a petition upon a different cause of action declaring upon a special promise, whereby defendant had agreed, for valuable consideration, to pay, and plaintiff to receive, a less sum in satisfaction of the note, and explaining that he had brought the suit before the magistrate because defendant had repudiated the special agreement. The court held, first, that the cause of action declared on in this petition being an entirely different one from that sued on before the magistrate, the Common Pleas acquired no jurisdiction on appeal; but, secondly, that defendant, instead of demurring for want of jurisdiction, having demurred to the petition generally, had submitted to the jurisdiction, and thus the Common Pleas had original jurisdiction of the case made by the petition there filed. Thirdly, the court reversed the judgment of the Common Pleas for instructing the jury that the suit brought before the magistrate would not prevent a recovery on the special contract. The Supreme Court, at pp. 373, 374, said:

"In so instructing the jury we think the Court of Common Pleas erred. The plaintiffs below, in their petition, say that the defendant repudiated the special contract, and that they, upon learning that fact, brought their action before the justice, as they well might. It is quite true that when the defendant below refused to abide by and perform the alleged contract, the plaintiffs below had a right to regard it as rescinded. They had a clear right of election. They might either abide by the special contract and bring their action to recover for its breach, or they might acquiesce in the repudiation of it by the other party and bring their action on the note, and recover, if they could, the full amount of principal and interest due thereon. They chose the latter alternative, and *brought suit upon the note.*

"And by *that* election freely made they must be conclusively bound. Having chosen to abandon the special contract, and try the chances of recovering a larger sum upon the liability of the defendant as the husband of their original debtor, they can not, when this cause of action fails, fall back on the special contract to which they have put an end by a conclusive act of disaffirmance. Plaintiffs below had alternative remedies, but not remedies to be enforced alternately. The insuperable difficulty in the case of plaintiffs below is not that their cause of action before the justice was a *different* one from that stated in their petition, but that *suit* upon the former necessarily implies a recission and abandonment of the latter." (Italics ours.)

Of this case, our learned adversaries (Brief, p. 64) say that the court held that, "having brought suit on the promissory note for the larger sum, and prosecuted it to *judgment*, they could not afterward have recourse to the special contract." Firstly, the plaintiff had not "prosecuted his suit to judgment," for the judgment was against him—for defendant; deciding that defendant had become released from liability upon it, but leaving the note valid as a contract

not merged in any judgment. Secondly, there was no judgment in existence, for in Ohio an appeal vacates the judgment, leaving the case to be tried *de novo* in the appellate court, where the pleadings may be amended and the issue is tried upon any testimony that may be offered, just as though there had never been a trial in the court below. The case was in the Common Pleas as a court, not of *appellate*, but of *original*, jurisdiction. The plaintiff failed not because judgment had gone against him in the suit upon the note—a judgment vacated by the appeal—but because, judgment or no judgment, *suit* upon the note necessarily implied a rescission and abandonment of the rights under the special agreement.

In *Benedict* v. *National Bank of the Commonwealth*, 4 Daly, 171, "the plaintiff having been induced to make a loan on call on the security of forged bonds, after discovering the fraud, sued on the contract, and attached the money standing to the credit of the borrowers in the bank in which they had deposited the proceeds of the fraudulent loan, but proceedings in bankruptcy having been taken against the defendants in that suit, he discontinued and brought an action of tort against the bankrupt and his assignee in bankruptcy, claiming that the money in the hands of the bank was the identical money obtained from him by fraud, and that he was entitled to it as owner: *Held*, that by the proceedings in the first suit he had elected to affirm the contract and was barred from bringing a second suit founded in tort." At pages 175–6, the court said: "I think plaintiff exercised and manifested his election *in bringing his action on the contract* [not "in levying an attachment"], and that the subsequent discontinuance of the proceedings then taken could not change the legal effect of his action. He had full knowledge of the fraud, and the decision then made, although it might have been influenced, could not be impaired, by his want of knowledge as to what disposition had been made of the proceeds of the

checks. Having in the first instance treated the fund as the property of the debtors, he can not now escape the consequences of his own deliberate act, nor prejudice the rights of other creditors to the fund." In our case, Robb and Strong, by their cross-petitions, seeking as creditors of the firm subrogation to Roelker's mortgage, treated the real estate as ours; and its proceeds as money in the hands of their own agents; and can not now escape the consequences of their own deliberate act, nor prejudice the rights of innocent purchasers of the land.

In the case just cited (see at p. 174), counsel for plaintiff argued that "if the act of the plaintiff may be deemed an agreement to waive the tort, it was certainly an agreement coupled with a condition, the condition being to waive it, provided he could retain his attachment. Being deprived of that, the condition failed, and the agreement and election fell with it and became void." But the argument failed to prevail with the court.

Precisely the same argument is made by our learned opponents. In their brief (p. 34), they say: "Even had Robb and Strong desired to make an election, they had not sufficient knowledge of Kebler's estate and of the value of Roelker's security to enable them to have made an intelligent choice. Kebler's affairs were in dire confusion."

They were; and Robb and Strong knew it when they filed their cross-petitions, for Coppock's petition advised them of it.

In their brief (p. 37), they say, "the filing of the answer and cross-petiton of Robb and Strong in the Coppock case should be regarded only as a conditional ratification," using almost the identical language of the argument unsuccessfully urged in the case last cited. This sums up in a sentence the suggestion running through their entire brief that they filed their cross-petitions under some mistake. But there was no

mistake. When they filed their cross-petitions they had as full information of all of Kebler's acts "on their behalf" as they have to this day. Kebler's affairs were in confusion, and they knew it. There may have been uncertainty as to the amount of Kebler's estate, and of the value "of Roelker's security;" but upon this they chose to speculate for six months, while we were at their mercy, and this choice concluded them. (*Supra*, pp. 31–32, and *Heller* v. *Elliott*, 45 N. J. L. 564, *infra*, pp. 38–39.)

In *Wilmot* v. *Richardson*, 4 Abb. App. Dec. 614, it was held that:

"A seller of merchandise, with a lien for the price, who, with knowledge that the buyer has obtained advances upon consignment to factors abroad, sues the buyer, on contract, for the price, thereby ratifies the sale, and can not afterward recover against the consignee in an action for money had and received."

At pp. 616, 617, the court said:

"On May 20th, three days after Wilmot's interview with the defendants and Patterson, the plaintiffs commenced a suit against Patterson for this demand for goods sold and delivered. They obtained an attachment upon an affidavit of the plaintiff, Wilmot, in which he swears that Patterson is indebted to the plaintiffs in over ten thousand dollars for this flour sold and delivered to him on May 12th. There is not one word of qualification or explanation of that suit or of that affidavit. Was not the sale and delivery then fully ratified by that suit? I think it was. *Morris* v. *Rexford*, 18 N. Y. 552. This, it will be observed, was directly after the whole matter was consummated. Whether the delivery was qualified or absolute — whether the sale was fraudulent or fair—the plaintiffs by this affidavit and proceeding elected to hold it by an action a consummated sale, an actual, absolute delivery."

The report does not show whether or not the attachment was ever levied.

In *Thompson* v. *Howard*, 31 Mich. 309, it was held that:

"A party may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

"The doctrine of election is applied in this case to preclude one from bringing an action in case for the unlawful enticing away and harboring his minor son, after he had first brought *assumpsit* for the son's wages during the same period on the basis of an implied contract, and after a trial, had submitted the case to the jury, and upon their disagreeing had *discontinued the suit*."

At page 312 the court said:

"His proceeding necessarily implied that defendant had the young man's services during the time *with plaintiff's assent*, and this was absolutely repugnant to the foundation of this suit, which is that the young man was drawn away and into defendant's service *against the plaintiff's assent*." (Italics are the court's.)

We submit that no valid distinction can be drawn between discontinuing a suit after a mistrial and withdrawing a petition pursuant to leave of court after it has been on file for months.

In *Heller* v. *Elliott*, 45 N. J. L. 564, it was held that:

"The making of an affidavit in attachment by a vendor of goods, and the issuing of a writ thereon, constitute a waiver of the right to reclaim the property, and are an affirmance of the sale."

After the attachment by plaintiffs the property was re-

plevined by one claiming as innocent purchaser for value from the vendee. The court said:

"The plaintiffs then discontinued their attachment and brought suit to recover the value of the goods on the ground that inasmuch as they were sold for cash, to be paid on delivery, and the price was not paid, no title passed by the delivery. The judge at the circuit nonsuited the plaintiffs on the ground that they had waived their right to reclaim the property, and had elected to treat the sale as absolute and unconditional. The evidence of the waiver and election was the making, by Heller, of the affidavit in attachment and the issuing" [not the "levying"] "of the writ. That these acts constituted a waiver of the right of reclamation and were an affirmance of the sale there can be no question. The plaintiffs, however, urge that they were done in ignorance of the facts, and that therefore they ought not to be held to be evidence of waiver or election. But the evidence is that the reason why the plaintiffs did not have recourse to the remedy of reclamation was that they supposed that the goods were out of reach, and they therefore chose to proceed by attachment to recover the price. They were properly held to be bound by their action. The judgment of the Supreme Court should be affirmed."

In *Dibblee* v. *Sheldon*, 10 Blatchford, 178, the syllabus is:

"Where a vendee purchases goods by means of such fraudulent representations as entitle vendor to disaffirm the sale and reclaim the goods as his own property; and the vendor, after discovering the fraud, voluntarily brings an action on the contract of sale and purchase, to recover the contract price, that is, as matter of law, an affirmance of the sale, and the vendor can not thereafter set up title, and claim the goods, on the ground of the original fraud."

At page 179 the court stated the point for decision as follows:

"The single question raised by the bill of exceptions in

this case is this: Where a vendee purchases goods by the means of such fraudulent representations as entitle the vendor to disaffirm the sale and reclaim the goods as his own, and such vendor, after discovering the fraud, voluntarily brings an action on the contract of sale and purchase, to recover the price, is that, as matter of law, an affirmance of the sale, or may he thereafter set up title and claim the goods, on the ground of the original fraud?"

It will be observed that the fact that the defrauded vendor in his action on the contract for the purchase price had caused an attachment to issue and be levied, is not even mentioned as a factor in the statement of the problem for solution. At pages 180, 181 the court said:

"It is the fact that the vendor elected his remedy, and acted affirmatively upon that election, that determines the point in issue, and not the *extent* to which he pushes his election; and I am not aware of any sufficient ground for saying that he is not concluded *until he has recovered judgment.*" (Italics ours.)

In *Littlefield* ads. *Brown*, 1 Wend. 398, the plaintiff had taken his debtor in execution, but the sheriff suffered a voluntary escape previous to the return of the *ca. sa.* However, the sheriff committed the prisoner to the liberties of the jail at the return of the execution. More than a year afterward the prisoner again left the limits of the jail and remained absent. This action was for the second escape. But it appeared that plaintiff had previously sued the sheriff for the first escape. That action had not been pressed, and judgment as in case of nonsuit for not bringing it to trial had been entered. Yet the mere *bringing* of that suit was held an election barring the present suit. The plaintiff originally had a right to look to the sheriff for damages for the escape, treating the prisoner as out of custody, or to pursue the prisoner treating him as still in execution; but he could not do both.

The court, at pages 404, 405, said:

"In the case of *McElroy* v. *Mancius* (13 Johns. R. 122), the court, referring to the case of *Rawson* v. *Turner*, considers it as deciding that the *bringing* of a suit is the determination of the plaintiff's election, which he had, either to consider the prisoner out of custody or in execution. . . .

"From the principles established in the latter case, it follows that the bringing of a suit against a sheriff, is an election on the part of the plaintiff to consider Hopkins out of custody. It would be idle for a plaintiff to prosecute the sheriff for an escape, when in truth no escape had happened; but is the commencement of such a suit to conclude the plaintiff? The commencement of a suit seems to be an assertion by the plaintiff that a right of action exists, that an escape has taken place. It is also the determination of the election of the plaintiff, to look to the sheriff, and of course not to pursue the original defendant." (Italics are the court's.)

It will not be claimed, we presume, that suffering a nonsuit for not bring the case to trial is "prosecuting the suit to judgment."

This case was affirmed in 11 Wendell, 467, by the court for the Correction of Errors, twelve members voting for affirmance and seven for reversal. But the dissenting judges did not dissent upon this point.

In *Rodermund* v. *Clark*, 46 N. Y. 354, the head note is as follows:

"Where a party has an election between two inconsistent remedies, he is confined to that which he first chooses.

"W. and defendant were joint owners of a sloop. Defendant, ignoring W.'s rights, sold the whole vessel to M. W. after the sale, took and retained possession. M. thereupon libeled the vessel, as owner, in the United States District Court. She was seized by the marshal, and M., having obtained judgment by defanlt, she was delivered to him. W.

assigned his interest, and also his claim against defendant, to plaintiff, who sues for conversion.

"Held, that W. having elected to assert his rights, by retaining possession and refusing to recognize the sale, he and his assignees were precluded from maintaining an action for the conversion."

At page 357 the court said:

"Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. (*Morris* v. *Rexford*, 18 N. Y. 552.) Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

In *Conrow* v. *Little*, 115 N. Y. 387, at pp. 393–4, the court said:

"The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practiced by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of 'a breach of contract to pay for goods and money loaned obtained by fraud.' The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one,

the whole estate of the debtor is pursued in a summary manner, and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practiced by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election. The principle applied in *Foundry Company* v. *Hersee*, 103 N. Y. 26, and *Hays* v. *Midas*, 104 Id. 602, require this construction, for the present contains the element lacking in those cases, viz., knowledge of the fraud practiced by the vendee; and by reason of it the plaintiffs were put to their election.

"It is not at all material to the question that the plaintiff discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed, *and it is of no consequence whether or not the plaintiffs made their choice effective.*"

True, an attachment had been issued and levied in the case, but that fact is referred to simply as showing that plaintiffs made their election with full knowledge of the facts, the allegations of the affidavit upon which the attachment was procured proving such knowledge. This appears from the remark of the court that "they then knew of the fraud practiced by him, and disclosed that knowledge in the affidavit on which the attachment was granted;" and the further statement that "it is of no consequence whether or not the plaintiffs made their choice effective."

In *Bach* v. *Tuch*, 126 N. Y. 53, it was held that:

"Where a vendor, who has been induced by fraudulent representations to sell his goods, elects to ratify the sale after knowledge of all the material facts, such election will be conclusive, although at the time he makes it he is ignorant that his vendee has made similar fraudulent representations to others, by which he had obtained property from them.

"It is not necessary, in order to make the election conclusive, that the party electing shall be acquainted with all of the evidence which may tend to prove the fraud; it is sufficient if he has knowledge of all the material facts showing the actual perpetration of fraud upon him. *Hays* v. *Midas*, 104 N. Y. 602, distinguished.

"Plaintiff sold certain goods to M., defendant's assignor, on credit. Before the term of credit expired, M. made an assignment for the benefit of creditors to defendant. Plaintiffs immediately brought an action against M. to recover the purchase-price of the goods, and caused an attachment to be issued therein, the complaint and affidavits alleging that the sale was induced by false and fraudulent representations on the part of M. The attachment was vacated, and thereupon said action was discontinued. This action was thereafter commenced to recover possession of the goods sold, on the ground that M. purchased with a fraudulent intent not to pay for the goods. Plaintiffs proved false and fraudulent representations made by M. to other parties, which they claimed were not known to them when the first action was commenced. Held, that plaintiffs, by their first action, made an election which ratified the sale to M., and so they could not maintain this action; that ignorance of the representations made to others at the time of the bringing of the first action did not destroy its effect as an election; also, that a charge in the second action of fraudulent intent at the time of the purchase not to pay did not constitute a separate fraud."

In this case, also, an attachment had issued, but again that fact is referred to by the court (see at pp. 56, 57) only as proving, by the affidavit upon which it was obtained, that when the plaintiffs made their election by bringing the first suit they did so with full knowledge of all the facts.

In *Butler* v. *Hildreth*, 5 Met. 49, it was held that "an assignee of an insolvent debtor," under the insolvent law of 1838, "may affirm a sale of goods made by such debtor for the purpose of delaying or defrauding his creditors, and receive the price of the goods from the vendee. And if such assignee, knowing all the facts of the case, brings an action against the vendee, on a note given by him for the price of the goods, and secures the demand by an attachment of his property, he thereby so far affirms the sale, and waives his right to disaffirm it, that he can not, by discontinuing such action, and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them.

At page 51, the court said: "It would, we think, be going too far to say that merely demand of the price would be deemed a waiver of his right to avoid the sale and claim the goods; because, in many cases, if the price could be obtained, it would be equally beneficial to the creditors, and he would have no farther occasion to pursue the harsher remedy of impeaching the sale. But we think that, if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act, too, deeply affecting the rights of the purchaser, whilst it is an assertion of his own; and if done with a knowledge of all the facts which ought to influence him in his election, it is conclusive."

Our learned adversaries seem to think that this is equivalent to a decision that a suit for the price without an attach-

ment would not be proof of an election, but we submit that it is not. It holds that a mere demand for the price would not, and that suit for the price with an attachment would be such proof, leaving untouched the question of the effect of a suit for the price persisted in for months.

In *Connihan* v. *Thompson*, 111 Mass. 270, at p. 272, the court said: "The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."

Mechem on Agency, § 151, says that: "One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon such an act."

Our learned adversaries (Brief, pp. 44–45) further quote from the opinion of Chief Justice Shaw, in *Butler* v. *Hildreth*, *supra*, his remarks as to the result when it appears that the election was made under a mistake of *fact* relating either to the right or the remedy. Those remarks conclude with the statement entirely applicable to this case: "But no mistake of fact of any kind was suggested in the present case." The plaintiffs do not show a single fact now within their knowledge which they were unaware of when they filed their cross-petitions.

In *Scarf* v. *Jardine*, 7 App. Cas. 345, "A firm of two partners dissolved; one retired and the other carried on the business with a new partner under the same

style. A customer of the old firm sold and delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate, and afterward brought an action for the price against the late partner.

"Held, reversing the decision of the Court of Appeal, that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might, at his option, have sued the late partner or the members of the new firm, but could not sue all three together; and that having elected to sue the new firm he could not afterward sue the late partner."

At page 353, Lord Selborn, L. C., says:

"The question is, which I originally stated, namely, whether it is possible, after choosing to hold those who actually gave the order and received the goods liable, and proceeding against them as debtors in such a way as to amount to a distinct election to take their liability, to retract that and to fall back upon the liability which, on a different principle, might have been asserted against the other two, that is to say against Scarf and Rogers, to the exclusion of Beech. I think that the plaintiff was bound by his election, and that after approbating the liability according to the facts, and taking as his debtors those who had actually given the order, he could not, when it suited his convenience, retract it, reprobate it, and go back upon the liability, by estoppel of the man who never gave the order at all."

At pages 360–362, Lord Blackburn, after referring to *Jones* v. *Carter*, 15 M. & W. 718, as "most neatly stating the point," says:

"The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a mem-

orandum, or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and *whether he intended it or not*, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way—and would not be justifiable if he had elected the other way the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. In *Jones* v. *Carter* (the principle is general though the particular application is peculiar) the question was whether a man who had a right to avoid a lease had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which in modern times you do not actually enter; but it had proceeded so far that the defendant had entered into a consent rule; and the defendant having entered into a consent rule by which he had admitted the entry, the court held that it must be taken as if the plaintiff had entered, and that inasmuch as the entry to avoid a lease was unequivocal in its nature he could not afterward say 'the lease was not void.'

"Now that is the question which I think the court below ought to have decided and which I think your lordships now, having power to find all the facts, have to decide upon the evidence. Was there, before the 30th of September, which was the date when the plaintiff first came upon Scarf, an unequivocal election to take Beech as his debtor? I do not think that at first there was. I do not think that the mere fact of his having continued to enter in his books these goods along with others which he had undoubtedly contracted to supply after the 25th of February, when he had full notice (entering them in one account) would preclude him; because I think, as I said before, that it was merely an expression of his own private intention and opinion, which did not bind

the matter until it was communicated to the other side, which it never was. I do not think that his having demanded money from Rogers after he knew that Rogers was carrying on the new firm of Rogers and Beech will do, for the reasons given by Brett, L. J., that the notice of dissolution distinctly said, 'Whatever Rogers & Scarf owe, go to Rogers, and Rogers will pay it.' But then the evidence goes further. I am not sure that taking a cheque from Rogers & Beach as payment was enough to make an election, because I think that in acting on the authority given by Scarf to Rogers to pay the debts for him and Scarf, Rogers might pay money by the new firm's cheque, or otherwise, as he pleased. But then the plaintiff goes on and issues a writ against Rogers & Beach—*he sues Beach. I am unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers & Beach I can not imagine.* (Italics ours.)

At page 363, Lord Watson says:

"He had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfillment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that having chosen to proceed against one of these firms for recovery of his debt he could thereafter treat the other firm as his debtor."

At pages 364, 365, Lord Bramwell (whose decision in *Priestley* v. *Fernie*, 3 H. & C. 977, is much relied upon by or opponents) says:

"Now, that being the condition of things, when the truth was known to the plaintiff, I do not think that he was bound to elect at any particular time; but I am satisfied that when he did elect he was bound, and that after seeking to enforce his remedy, or indeed enforcing his rights, against one pair,

that is to say Rogers & Beech, he had not the right to maintain another action against Scarf separately. He could not maintain a second action against Scarf unless he joined Rogers with him, and the result would be that there would be two actions against Rogers for the same debt. It seems to me demonstrable, therefore, that if the plaintiff *elected to sue* any two he could not maintain an action against the third man either separately or jointly with one of the two whom he had originally sued.

"That being so, the plaintiff was not bound to elect, but if he did elect he was concluded by his election; and without occupying your lordships' time further I have only to add that it is to my mind absolutely plain that in this case his conduct was an election to sue and maintain his action against Rogers & Beech, and consequently that he has lost his right to maintain any action against Scarf." (Italics ours.)

Calder v. *Dobell*, 3 L. R. 6 C. P. 486; *Priestley* v. *Fernie*, 3 H. & C. 977, and *Curtis* v. *Williamson*, L. R. 10 Q. B. 57, all much relied upon by our adversaries, were cited to the court in that case. (See at pp. 346, 347.)

Speaking of *Scarf* v. *Jardine*, our learned opponents (Brief, pp. 59, 60) say:

"We stop to observe that here was an instance of suit begun and carried on until bankruptcy is reached, when it could be no longer prosecuted, and then the prosecution is transferred to the bankruptcy proceeding. Pending that proceeding a new suit is begun against Scarf. It was eminently unjust for Jardine to delay during all the time from February 25, 1878, the date he had notice of Scarf's retirement, and of the fact that Rogers had assumed the old debt, until after he had forced Rogers into bankruptcy by the suit and then to make claim upon Scarf. For he thereby deprived Scarf, who really stood in the attitude of a surety for Rogers, from all recourse upon him during the period when he could respond. There was clearly ground of estoppel."

But, we ask, how does it appear that Scarf would have had effectual recourse upon Rogers; that Rogers could have responded? Had Scarf, as surety, paid, and sued Rogers for reimbursement, the suit would have been for the same amount as Jardine sued for, and as Rogers was unable to respond for that sum at the suit of Jardine, but by it "was forced into bankruptcy," there is no reason to suppose that the same result would not have followed if Scarf had been the plaintiff instead of Jardine. True, Jardine had Scarf at his mercy; by his election he did for months deprive Scarf "of the right, in itself a valuable one," to *seek* payment from Rogers, of the chance of "promptly, and, it may be, effectively, exercising" that right. (See, *supra*, pp. 31–33.) But, precisely similarly, in the case at bar, Robb and Strong, by their concealment for six months of Kebler's alleged want of authority, by the allegations of their cross-petitions adopting his acts and their pursuit of the proceeds of the sale as money in the hands of his surviving partners had and received on their behalf and not accounted for to them, deprived us of the like right against Kebler's estate. We are ready to admit that "there was clearly ground of estoppel."

Our learned adversaries (Brief, p. 35) say that "in all the cases where the pendency of a suit not prosecuted to judgment has been held to constitute a ratification, there has been either an attachment, a trial by jury, or a replevin or some other step taken whereby the plaintiff had acquired some advantage."

But, as we have seen in *Merrill* v. *Rokes*, 54 F. R. 450, there was no attachment, and no suit of any kind, yet the mere demand of the principal made on the agent for the proceeds of the unauthorized sale was held to be a ratification. So, in *Ryan* v. *Doyle*, 31 Ia. 53, where payment of a fee to the attorney was held to ratify his unauthorized appearance and validate the judgment. So, in *Jones* v. *Atkinson*, 68 Ala. 167, where the principal's offer to trade a mare in his agent's

possession was held a ratification of the agent's unauthorized acquisition of her. So, in *Woodward* v. *Suydam*, where it appears the mere drawing of a draft on the agent for the proceeds of his unauthorized sale was held a ratification. We are unable to see how the mistrial, in *Thompson* v. *Howard*, 31 Mich. 309, or the non-suit for failure to prosecute, in *Littlefield* ads. *Brown*, 1 Wend. 398, was something "whereby the plaintiff had acquired some advantage."

As to the weight to be given to the circumstance that an attachment had issued in the suit, by which alone our opponents seek to distinguish many of the cases cited by us, in *Anchor Milling Co.* v. *Walsh*, 20 Mo. App. 107, 110, a case cited by them, it was said: "It seems, however, to be supposed that there is something peculiar in an attachment suit which proceeds upon an affidavit and a seizure in the first instance of the defendant's property, which takes it out of the ordinary rule that the plaintiff may abandon one action without estopping himself from pursuing any other remedy which he may have against the debtor in respect of the subject-matter of such action. We know of no foundation for such a distinction."

In the cases cited by us where an attachment had issued (except only *Butler* v. *Hildreth*, 5 Met. 49), the attachment is not even referred to in the opinions as a factor influencing the decision. Generally, it is not even mentioned; sometimes, as in *Conrow* v. *Little*, 115 N. Y. 387, it is mentioned, but only because the affidavit upon which the attachment was issued proved that plaintiff made his election with knowledge of the facts. Moreover, in most of the cases, it does not appear that plaintiff succeeded in levying upon any thing. Chief-Justice Shaw speaks of an attachment as "an act deeply affecting the rights" of the other party. How deeply the act of Robb and Strong affected our rights, depriving us of the right, itself a valuable one, of seeking restoration and payment from the estate of Kebler, the per-

son committing the alleged wrongs, we have shown. (*Supra*, pp. 31–33.) And as against Roelker, Robb and Strong's cross-petitions had all the effect of an attachment of his mortgage claim. Seeking subrogation to his mortgage, their cross-petitions constituted a *lis pendens*, giving notice to the world that they claimed the benefit of that mortgage, tieing it up in his hands, making it impossible for him to dispose of it.

We come now to comment briefly upon some of the cases relied upon by the other side.

In *Morris* v. *Robinson*, 3 B. & C. 196, the various actions of trover were held to be not inconsistent remedies, but properly suable concurrently. Bayley, J., said: "If concurrent actions had been brought, that against the owners could not have barred the other; why, then, should it have that effect because they have been brought at different times?"

In that case, also, the owners of the goods wrongfully sold had sent a power of attorney to claim the proceeds from the registrar of the court which had without jurisdiction sold them. Before such demand made, that court had remitted the proceeds to the court in England. Plaintiffs did not and could not sue either the judge or the registrar of the court. We find in the report no warrant for the statement of our learned opponents (Brief, p. 36) that this application for the proceeds "was pending at the time of the trial of the suit in trover." Indeed, we do not see how it could have been, for when application was made under the power of attorney for the proceeds, "the same had then been remitted to England." The case only decides that application for payment made to a court for the proceeds of an unauthorized sale ordered by the court without jurisdiction, which proceeds are not in the possession, control, or authority of the court, is not a ratification of the sale.

In *Morgan* v. *Couchman*, 14 C. B. 100, one Golden acted as factor for both Morgan and Couchman. Being indebted to

Couchman he sold some of Morgan's goods to the latter, in an amount equal to his debt. Golden became bankrupt, and in that proceeding Morgan filed an affidavit claiming a debt of £70, 5s. 8d, "for goods belonging to this deponent sold and delivered by William Golden as factor or agent of this deponent, to Stephen Couchman (the defendant) and for which goods the said William Golden received payment by means of goods sold and delivered by the said Stephen Couchman to the said William Golden, and which goods were used by the said William Golden in the trade of a cheese monger." This was a suit for the goods of plaintiff sold by Golden as his agent to Couchman. The pleas were payment, and a claim of set-off against Golden alleging that Couchman did not know Golden was merely an agent of Morgan. This latter claim was negatived by the jury who found that the goods were not sold by Golden in his own name, and without notice to the defendant that the plaintiff was interested therein as alleged in the plea. The question of payment was not submitted to the jury, and they found for plaintiff for the amount claimed. It will be observed that ratification was not pleaded. The defendant claimed that he had proved his plea of *payment;* that Morgan having said in his affidavit that "Golden had received payment" for the goods sold to Couchman was estopped to say that they were not paid for.

Maule J. (p. 105) said:

"I am of opinion that this rule should be discharged. The question is, whether there was evidence that the money which the plaintiff seeks to recover was paid. The first piece of evidence relied on to show payment, was, the transaction which took place between Golden and Couchman. It appears that Golden had sold goods for the plaintiff, and also for the defendant; whatever arrangement, however, might be made between Golden and Couchman as to setting off the price of goods sold by the former to the latter against the consignments by the latter to the former, it can not, as between these

parties, amount to payment. Then, there is the affidavit which the defendant relies on as a kind of estoppel, in which the plaintiff speaks of this transaction in a proceeding against Golden. He does not, however, in that affidavit, state absolutely that the money was paid by the defendant to Golden for him. He states what he chooses to consider as payment: he says that Golden is indebted to him for goods belonging to him sold and delivered by Golden, as his factor or agent, to the defendant, and for which goods Golden received payment by means of goods sold and delivered by the defendant to Golden, and which goods were used by Golden in the trade of a cheese monger. That transaction does not amount to any thing like a payment of the debt due to the plaintiff from the defendant: and the circumstance of the plaintiff being anxious so to treat it, does not make it the more so than if he had said nothing about it. It is not at all in the nature of payment. If the facts detailed in the affidavit do not amount to payment, the circumstance of the plaintiff's calling it a payment will not make it so. The facts being all detailed, the conclusion that it amounted to payment is a mere matter of law which the plaintiff chose to infer. I think the affidavit does not show any such facts as amount to payment; nor do I think that any of the other facts which were given in evidence, as to the transactions between Golden and Couchman, at all operated as payment. It does not appear that there was any agreement that any thing which took place between Golden and the defendant should enure and operate as payment. That being so, I think the facts do not afford any inference from which the jury could legitimately find the issue on the plea of payment for the defendant."

Curtis v. *Williamson*, L. R. 10, Q. B. 57; *Priestly* v. *Fernie*, 3 H. & C. 977; *Calder* v. *Dobell*, L. R. 6, C. P. 486, and *Mason* v. *Cockroft*, 3 Duer. 366, are all cases in which the plaintiff had made a contract with the agent of an undisclosed princi-

pal. We may concede that they establish the doctrine that after the discovery of the principal, no legal proceedings short of judgment against either agent or principal, would preclude the plaintiff from abandoning his suit against the one, and bringing a new suit against the other. "Principal and agent were equally liable on the contract, and the vendor had a clear option as to which of them he would hold responsible:" *Curtis* v. *Williamson*, L. R. 10, Q. B. at p. 59. The agent is liable on the contract, because he contracted in his own name. The principal is liable on the contract, because it is *his* contract though made by the hand of another. In the absence of a change in the account between principal and agent, after discovery of the principal, or of some other act giving rise to an estoppel, plaintiff may sue either of the persons *party to that contract.* He may sue each in a separate suit, and one suit could not be pleaded in abatement of the other. His rights are concurrent, not inconsistent. *Until that contract, upon which each is liable, is merged in a judgment, it is available as a cause of action against either.* That is what Baron Bramwell meant when, in *Priestly* v. *Fernie*, he said, that the very expression that "where a contract is so made, the contractee has an election to sue the agent or principal supposes he can sue only one of them, that is to say, sue to judgment. For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other."

Peters v. *Ballistier*, 3 Pick. 495, was an action of trover for a cargo of molasses, which had been sold by the master of a ship, to defendants, partly for money and partly in cancellation of a debt due by his principals to defendant. He had authority to sell for money, but not in payment of his principals' debts. The money was expended for their benefit, but without their knowledge. They sued defendants in *assumpsit* for the balance of the purchase price of the molasses, but later abandoned the suit in *assumpsit*, and then sued in trover. It was held that the first suit was not a ratification, but

that on returning the amount of the money payment, their action in trover would lie. The case was decided on the ground that plaintiffs had not ratified by the action of *assumpsit*, because they never had a cause of action in *assumpsit*. Any attempt to ratify their agent's act, would necessarily ratify it in its entirety. Ratification of the sale meant necessarily ratification of all its terms, including the mode of payment. If that was ratified *assumpsit* for the balance could not lie. *Assumpsit* could not mean ratification, because ratification precluded the possibility of *assumpsit*. The case is clearly explained by C. J. Shaw, in *Butler* v. *Hildreth*, 5 Met. at p. 52. The distinguished chief-justice said: "Of a similar character is the case of *Peters* v. *Ballistier*, 3 Pick. 495, which at first view seems like the present. The plaintiffs first brought an action of *assumpsit*, which they discontinued, and afterwards brought trover, which they maintained. But the dicision proceeded on the ground that the plaintiffs had, in the first instance, misconceived their remedy, and could not maintain an action of *assumpsit*; that they had no election to make, and could only recover against the defendants in an action of trover, relying on their legal title to the property, and a conversion by the defendants." It is submitted that it is an entire mistake to say, as our learned adversaries do (Brief, p. 42), that "the misconception involved in bringing the action in the form of *assumpsit* consisted in the fact that it would have entitled the defendant to a set-off, which they could not take advantage of in trover, hence the discontinuance of the first and the institution of the second."

Valpy v. *Saunders*, 5 C. B. 886, was trover by the assignee of a bankrupt for goods purchased by defendant with notice after commission of the act of bankruptcy. Before bringing this suit, the assignee had sent defendant a bill for the goods, demanding the purchase price which defendants refused to pay. This was held no bar to the action in trover. Defendants were creditors of the bankrupt and

wanted the benefit of a set-off. But (see p. 891) "it was proved that before the delivery of the goods, the shopman who sold them informed the defendants that the goods must be paid for to the estate of the bankrupt." Demand of payment under such a contract could not be a waiver of the right to bring trover upon defendants' repudiation of the terms of sale.

In *Anchor Milling Co.* v. *Walsh*, 20 Mo. App. 107, a mortgagee of chattels brought suit on his debt and attached the mortgaged property. Afterward he dismissed that suit and replevined the mortgaged property for condition broken. It was held that bringing the first suit and dismissing it was no bar to the second. We perceive no reason why it should be.

The case of *Johnson-Brinkham Co.* v. *Central Bank*, 22 S. W Rep. 813, seems to stand alone among the authorities. It is opposed to all of them; the opinion in *Heller* v. *Elliott*, 45 N. J. L. 564 (*supra*, pp. 38, 39), is particularly applicable to the facts.

Bunch v. *Graves*, 111 Ind. 351, was decided on the ground (see at p. 352) that "a party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one, which is not inconsistent with his true and effectual remedy which he should have pursued in the first instance."

Smith v. *Bricker*, 53 N. W. Rep. 250, simply holds that a petition in an action for damages for false representations inducing an exchange of lands, might by amendment be changed to a petition for rescission.

Huffman v. *Hughley*, 11 Lea, 549, was decided upon the ground that "the commencement of an action by the injured party against one of a series of tort feasors, upon the implied promise arising from the conversion of personalty, will not be a waiver of his rights against the other tort feasors."

Wells-Fargo Co. v. *Robinson*, 13 Cal. 134, holds that an

action establishing a claim against the estate of a deceased embezzler, does not preclude the plaintiff from pursuing by bill in equity and fastening a trust upon the specific funds embezzled. No reason is perceived why it should.

Dean v. *Yates*, 22 Ohio St. 388, was a case in which there was not a sale voidable for fraud, but a case of possession without title at all (syllabus 2, p. 389, p. 397). There could, therefore, be no question of electing to affirm a voidable sale. There was nothing to affirm. Hence, attaching part of the goods in the hands of the wrongful possessor for fraud, did not preclude replevin against another possessor without title of the remainder.

In *Becker* v. *Walworth*, 45 Ohio St. 169, the remedies between which it was claimed an election had been made, were held to be not inconsistent. The court, at page 174, said:

"She had the right, in such event, to look to the estate, or to the executor personally, and these remedies were not inconsistent. There would be no taking of one thing and rejecting another. The former remedy was primary, and the latter, in a sense, cumulative. The executor stood in two relations, but that did not make the plaintiff's claim inconsistent."

Ex parte Adamson, 8 Ch. D. 807, only decides that a creditor who having the right to prove either against the joint estate of a firm, or the separate estate of the partners, but not knowing that he has the latter right proves against the joint estate, may withdraw that proof and be allowed to prove against the separate estate of the partners.

All of the cases cited by our adversaries, except *Morris* v. *Robinson*, 3 B. & C. 196, and *Peters* v. *Ballistier*, 3 Pick. 495, are cases not of ratification, but of election. True, we, too, in addition to cases of ratification, have cited numerous cases of election to show that even the law of election is against them. But the question in the case at bar is one not of election, but of ratification.

"The term 'ratified,' when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent." *Ellison* v. *The Jackson Water Co.*, 12 Cal. 542.

One for whom an unauthorized agent has assumed to act may ratify the act; but it is a misuse of language to say that he has an *election* to ratify the act of his agent. It might as well be said if an offer is made and accepted, that the acceptor has *elected* to make a contract; that if a man eats three meals a day, he has *elected* not to die of starvation; that if a man continues to live, he has *elected* not to commit suicide; that if a man marries only one wife, he has *elected* not to commit bigamy. This would make every sane act connote an *election* not to do all other possible acts.

We may assume that, in every case of election, the person having the right of election may, in the absence of a change of position of others, raising an estoppel, change his election as often as he pleases. This, because election, generally, if not always, operates only prospectively; but ratification always operates retrospectively. Election concerns the choice between inconsistent rights or remedies, the affirming or repudiating voidable acts; ratification has to do with the adoption of acts until then void. The right of election may be conceded to be ambulatory, so as to produce no results until some one has acted upon the faith of an election made; ratification is not based upon estoppel, but is of itself in its effect instant and final.

That ratification simply operates by supplying something previously wanting, thereby validating what for such want had been until then void, is shown by the maxim, "*omnis ratihabitio retrotrahitur et mandato priori aequiparatur:*"

a maxim which has been part of our law since a time long anterior to that of Coke. See Coke Littleton, 207*a*.

In *Bronson's Ex'r* v. *Chappell*, 12 Wall. 681, 683, this court said:

"Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner."

In *Cook* v. *Tullis*, 18 Wall. 332, 338, this court said:

"The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification."

In *Wilson* v. *Tumman*, 6 M. Gr. 236, 242–3, Tindal, C. J., said, "That an act done *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his *previous* authority."

The retroactive efficacy of ratification is strikingly illustrated by the case of *Bolton Partners* v. *Lambert*, 41 Ch. D. 295.

There "an offer of purchase was made by the defendant to S., who was the agent of the plaintiffs, but was not authorized to make any contract for sale. The offer was accepted by S. on behalf of the plaintiffs. The defendant withdrew

his offer, and after the withdrawal the plaintiffs ratified the acceptance of the offer by S. In an action by the plaintiffs for specific performance of the contract:

"Held (affirming the decision of Kekewich, J.), that the ratification by the plaintiffs related back to the acceptance by S., and therefore the withdrawal by the defendant was inoperative, and the plaintiffs were entitled to specific performance."

Such being the operation of ratification, it follows, necessarily that there is no *locus pœnitentiæ*; if an act be once ratified, there is no room for reconsideration or revocation.

In *Smith* v. *Colgan*, 2 T. R. 189, note, Buller, J., said: "Now, if with a knowledge of all the circumstances, he adopted the defendant's acts for a *moment*, he ought to be bound by them."

In *Rolling Stock Co.* v. *Railroad*, 34 Ohio St. 450, 463, the court said: "A ratification once made becomes as irrevocable, obligatory, and binding as if the act of the agent were previously authorized."

Evans on Principal and Agent, p. 76, says: "There are two rules respecting ratification which may be noticed here. The first is, that if a principal ratifies and adopts the agent's acts, even for a moment, he is bound by them. In other words, after ratification, there is no *locus pœnitentiæ*."

Robb and Strong, having ratified Kebler's acts as done "on their behalf," can not now repudiate them. That the judgment of the Circuit Court so holding was right, is respectfully submitted.

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Of Counsel.

CINCINNATI, O., February, 1894.

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Supreme Court of the United States.

OCTOBER TERM, 1893. TERM NO. 252.

James Hampden Robb and Charles E. Strong, Trustees,

Appellants,

vs.

August Vos and William Stix,

Appellees.

BRIEF FOR WILLIAM STIX.

GUSTAVUS H. WALD,
For William Stix.

CHARLES B. WILBY,
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BRIEF FOR WILLIAM STIX.

I.

AS TO THE JURISDICTION OF THIS COURT.

The appeal as against William Stix must be dismissed for want of jurisdiction, it not appearing that the controversy as regards him involves the requisite amount or value, but the contrary appearing by the record. The object of the suit is to obtain a declaration that by his purchase at judicial sale of three certain parcels of ground, William Stix obtained no title as against appellants. The three parcels are described in complainant's bill. (Record, pp. 8, 9.) The report of the master commissioner (Record, pp. 42 *et seq.*) who made the sale shows (Record, p. 43, paragraphs 4, 5, and 6) that he sold these three parcels to William Stix for $1,333.50, $1,333.50, and $464.32, respectively, in each case for more

than two-thirds of the appraised value, making a total of $3,131.32, far short of the amount necessary to give this court jurisdiction upon appeal. There is nothing else in the record as to their value.

It is, perhaps, well to call attention to the fact that to the property mentioned in paragraph 2 of the master commissioner's report (Record, pp. 42, 43), sold to William Stix for $6,425, the complainants never had or claimed title. It is not mentioned in their bill, they never claimed any interest in it, and it has no connection with this suit. The facts that at the same sale other and entirely distinct parcels of land, claimed by complainants, were bought by August Vos in an amount large enough to permit an appeal to this court against him, and that complainants, for their own convenience, joined Vos and Stix as defendants to a single bill, do not enable them to take up the case against Stix in combination with their appeal against Vos, the interests of Vos and Stix not being joint, but entirely separate and distinct. The lots bought by Stix were parts of lots number 2, 4, and 5, of block 12, in Findlay and Ludlow's commissioner's subdivision; the lots bought by Vos were all of lots numbered 3, 4, and 5, of a different subdivision. (Record, p. 43, paragraphs 3, 4, 5, 6; also, p. 9.)

Numerous decisions of this court upon this subject were examined and the principles applicable to its various aspects were expounded by Mr. Justice Gray in *Gibson* v. *Schufeldt*, 122 U. S. 27.

At p. 30, the learned justice said:

"Generally speaking, however, it may be said, that the joinder in one suit of several plaintiffs or defendants, who might have sued or been sued in separate actions, does not enlarge the appellate jurisdiction; that when property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distri-

bution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party; that when two persons are sued, *or two parcels of property are sought to be recovered or charged*, by one person in one suit, the test is whether the defendants' alleged liability to the plaintiff, or claim to the property, is *joint or several;* and that so far as affected by any such joinder, *the right of appeal is mutual, because the matter in dispute between the parties is that which is asserted on the one side and denied on the other.*" (Italics are ours.)

At page 38, in the same case, the learned justice said:

"In ejectment against two defendants for two parcels of land, if each defendant claims only one parcel, the value of each parcel is the limit of appellate jurisdiction."

In *Clay* v. *Field*, 138 U. S. 464, this court, speaking through Mr. Justice Bradley, at pages 479–480, said:

"The general principle observed in all is, that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but *where their interests are distinct*, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities can not be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone." (Italics are ours.)

In *Walter* v. *North-eastern Railroad Co.*, 147 U. S. 370, this court, speaking through Mr. Justice Brown, at page 373, said:

"It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the

court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff."

In *Tupper* v. *Wise*, 110 U. S. 398, which was a case of ejectment brought against two defendants to recover two parcels of land, each defendant claiming "a separate and distinct interest in a separate and distinct part of the land," the syllabus is as follows:

"Distinct judgments in favor of or against distinct parties, though in the same record, can not be joined to give this court jurisdiction."

In *Paving Co.* v. *Mulford*, 100 U. S. 147, the syllabus is as follows:

"A bill filed in the Supreme Court of the District of Columbia by A. against B. and C., alleging that each held certificates of indebtedness belonging to him, was, on final hearing, dismissed, and he appealed: *Held*, that, as the recovery, if any, must be against the defendants severally, and as the amount claimed from each does not exceed $2,500, this court has no jurisdiction."

In *Schwed* v. *Smith*, 106 U. S. 188, 190, Chief Justice Waite, speaking of such a case, said:

"The theory is that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action."

In *Stratton* v. *Brown*, 8 Peters, 4 (Curtis' Ed.), the syllabus is as follows:

"In a salvage case, each several claimant has a distinct interest and a several right of appeal; the matter in controversy between him and the libellants is not the whole salvage compensation, but so much of it as is chargeable on his prop-

erty; if the latter do not amount to $2,000, the libellants can not appeal to this court."

To the same effect is the language of Chief Justice Taney in *Shields* v. *Thomas*, 17 Howard, 3, at p. 6.

II.

Upon the Merits.

A.

Kebler's (alleged) want of authority was not proved.

The principal facts in the case are sufficiently stated in the brief of our learned adversaries, so that it is unnecessary that we should set them forth. We shall in the course of our argument refer to such parts of the record not adverted to by them as may be necessary. They say in their brief (p. 12) that "Kebler's want of authority in this case is clearly proven, and the *prima facie* presumption of authority is overcome by the evidence of complainants."

We contend, on the contrary, that the character of the evidence is not such as would in an action at law overcome the strong presumption in favor of an attorney's authority to appear, which public policy requires, when, long after judgment and after the attorney's death, such authority is denied as against innocent purchasers under the decree; and, further, that not only the character, but also the quantity, of the testimony is insufficient to prove the allegations of the bill against the sworn denial of the answer.

In *Shelton* v. *Tiffin*, 6 Howard, 163, 186, the court said:

"This" (the entry of appearance) "being done by a regular practicing attorney, it affords *prima facie* evidence, at least, of an appearance in the suit by both the defendants. Any individual may waive process and appear voluntarily."

Weeks on Attorneys, p. 427, says:

"Of course, when an appearance has been entered, the claim to deny the authority of the attorney is viewed with disfavor whenever innocent third parties have acquired, or think they have acquired, rights under the judgment or decree."

In the article quoted from by our learned opponents, 5 American Law Register, New Series, 385, at page 396, Judge Dillon says:

"It is admitted, however, that a large degree of sanctity must be attached to the records of courts; that it is incumbent on a party assailing them, on the ground of the want of authority in the attorney to appear, to make out a clear and unmixed case. Public policy requires this in view of the fact that it is easy for one party, especially after the lapse of time, to deny the attorney's authority, and difficult for the other party to show the authority even if it existed. The inference from this, however, is not to hold the unauthorized judgment valid, but to require the party assailing it to show clear merits, to take prompt action, and to establish his right by cogent and strong evidence."

The evidence shows that one of the complainants, Charles E. Strong, never "had any thing to do with this trust, except, nominally, to be a trustee." (Record, p. 123.) James Hampden Robb was the managing trustee. The only persons who knew whether Robb expressly or tacitly authorized Kebler to enter appearance for the trustees and file an answer and cross-petition for them were Robb and Kebler. Death has sealed Kebler's lips. Robb is the only witness who speaks in denial of Kebler's authority. Kebler died November 23, 1887. At that time the trustees admittedly learned all the facts as to Kebler's acts on their behalf. Did Robb then speak in disavowal of them? He did not hint at such a thing. Not only was there absolute silence as to such claim, but more than three months later, March 2, 1888, Robb and Strong

filed their answer and cross-petition, sworn to by Robb, in the case of *Coppock* v. *Kebler*, No. 79,812, and after another interval of more than a month, on April 10, 1888, filed another answer and cross-petition *totidem verbis* in the case of *Coppock* v. *Kebler*, No. 79,902. These answers and cross-petitions not only fail to hint that Kebler had not been authorized to appear for them, but throughout affirmatively assert his and his firm's acts to have been done on behalf of Robb and Strong. It was not until May 12, 1888, six months after Kebler's death, when they filed their petition in the Superior Court in case No. 4,182 (Supplemental Record, pp. 17–20), that the claim was first made that Kebler had acted without authority. The language of this petition and that of the answers and cross-petition are at once so similar and dissimilar, the resemblances and differences throw such an instructive light upon the claim of want of authority now set up, that we print these documents in parallel columns.

"And these defendants further say that on said day one Meyer Gugenheim, having recovered by the consideration of this court a judgment against the said Moritz Loth, brought suit in this court, case No. —— in this court, against the said Moritz Loth, and the defendants and divers other persons, praying, among other things, that these defendants may be declared to hold said lands by way of mortgage as security for the said purchase price on said lands of $10,000, and that said lands

"And the plaintiffs further say that on said day one, Meyer Gugenheim, having recovered by the consideration of the Court of Common Pleas of Hamilton county, Ohio, a judgment against the said Moritz Loth, brought suit in the said Court of Common Pleas, numbered 74,375, in the said court against the said Moritz Loth and these plaintiffs and divers other persons, praying, among other things, that these plaintiffs might be declared to hold said lands by way of mortgage as

might be free from the claim of these defendants and all other persons parties thereto to satisfy the said judgment ment of the said Meyer Gugenheim and the claims of divers persons therein made defendants.

"And these defendants further say that thereafter, to wit, on the 18th day of December, 1885, Chas. A. Kebler and Frederick G. Roelker, then partners engaged in the practice of law under the firm name and style of Kebler & Roelker, of the City of Cincinnati, *entered the appearance of these defendants* in such cause and filed an answer therein *on behalf of these defendants*; further say thereafter, to wit, upon the 10th day of May, 1887, said firm of Kebler & Roelker was dissolved and Chas. A. Kebler, Frederick Roelker, and Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of law in the City of Cincinnati under the firm name and style of Kebler, Roelker & Jelke, as security for the said purchase price of said lands of $10,000, and that the said lands might be sold free from any claims of these plaintiffs and all other persons parties thereto, to satisfy the judgment of the said Meyer Gugenheim and the claims of the divers other persons therein made defendants.

"And these plaintiffs further say that in said cause no summons or other process was ever issued for these plaintiffs (who then were and ever since have been non-residents of Ohio) and no advertisement was ever made for these plaintiffs, and that they had no notice of said proceedings; and these plaintiffs further say that thereafter, to wit, on the 18th day of December, 1885, one Chas. A. Kebler, then engaged in the practice of the law with one Frederick G. Roelker under the firm name and style of Kebler & Roelker in the said City of Cincinnati, did, *without authority* from these plaintiffs, and *without their knowledge*, enter the appearance of these plaintiffs in said case, and did file an

the successors of said firm of Kebler & Roelker, and these defendants say that thereafter all steps in said cause *on behalf of these defendants* were taken by said firm of Kebler, Roelker & Jelke, and by none others; and these defendants further say that such proceedings were afterward had in said cause that the said premises *were sold, free of the claims of these defendants* and of all other persons whoever, by one George Sidney Tylor, who was appointed special master commissioner by this court in said cause for the purpose of making such sale, and such proceedings were thereafter had in said cause that a decree was made in said cause on the 19th day of May, 1887, whereby it was ordered, adjudged and decreed that said George Sidney Tylor, special master commissioner in said cause, pay to *these defendants or their counsels, Kebler, Roelker & Jelke*, out of the proceeds of said sale the sum of $11,361; and these defendants further say that said sum was *duly paid* on the 16th day of June, 1887, to said firm of Kebler, Roelker

answer therein on behalf of these plaintiffs, using for that purpose said firm name of Kebler & Roelker.

"And these plaintiffs further say that thereafter, to wit, prior to the 11th day of May, 1887, the said firm of Kebler & Roelker was dissolved, and the said Chas. A. Kebler, the said Frederick G. Roelker, and one Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of the law in said City of Cincinnati under the firm name and style of Kebler, Roelker & Jelke, as successors to the said firm of Kebler & Roelker; and these plaintiffs further say that thereafter all steps in said cause *purporting* to be on behalf of these plaintiffs were taken in the name of the said firm of Kebler, Roelker & Jelke.

"And these plaintiffs further say that all steps taken in said cause at any time *purporting* to be on behalf of these plaintiffs were taken *without the knowledge* of these plaintiffs and *without any authority* from these plaintiffs; and

& Jelke by said George Sidney Tylor, special master commissioner, as ordered by the decree of said court, and that no portion thereof has been paid to these defendants or accounted for to them, and these defendants further say that since which time, to wit, on the 23d day of November, 1887, Chas. A. Kebler departed this life and that Frederick G. Roelker and and Ferdinand Jelke, Jr., are the surviving partners of said firm. Wherefore these defendants pray that said Ferdinand Jelke, Jr., may be made party defendant hereto and that it it may be adjudged that these defendants are *creditors* of said firm of Kebler, Roelker & Jelke, and that the property in the petition and cross-petition of Frederick G. Roelker sought to be sold may be sold, and that out of the proceeds thereof said sum, $11,361, with interest from the 16th day of June, 1887, may be paid to these defendants, and that these defendants may recover judgment against Frederick G. Roelker and Ferdinand Jelke, Jr., as surviving partthese plaintiffs say that all orders, decrees, and judgments entered in said cause *purport* to have been entered by and with the consent of these plaintiffs, but that the same were entered by the said Kebler, Roelker & Jelke, and *without the knowledge, consent, or authority* of these plaintiffs, and that these plaintiffs had no knowledge of said cause or the institution thereof, or of any proceeding therein, *until December* 2, 1887, being long after the conveyance of said lands to the purchasers thereof, in pursuance of the *pretended* sale made in said case.

"And these plaintiffs further say that such proceedings were had in said cause number 74,375, that the said premises were sold by one George Sidney Tylor, who was appointed special master commissioner by said Court of Common Pleas for the purpose of making said sale of property, and that said special master commissioner *purported* to make said sale free of the claims of these plaintiffs and of all other persons

ners of Kebler, Roelker & Jelke, for said sum of $11,361, with interest from the 16th day of June, 1887, and for their costs."

whatever parties to said cause, and that the said parcels of land were purchased respectively at said sale by the said August Vos purchasing lots numbered 3, 4, and 5, hereinbefore described, of the subdivision of the tract of land on the west side of Vine street 100 feet front and extending back westwardly 132 feet of the same width in front as in rear, and the said Wm. Stix purchasing the other lots hereinbefore described, to wit, all those parts of lots 2, 4, and 5 of block 12 of Findlay and Ludlow subdivision hereinbefore described.

"And these plaintiffs further say, that in said cause numbered 74,375, a decree was made on the 19th day of May, 1887, whereby it was ordered, adjudged, and decreed that the said George Sidney Tylor, special master commissioner in said case, pay to these plaintiffs or to Kebler, Roelker and Jelke, *purporting* to be their attorneys in said cause, out of the proceeds of said sale the sum of $11,361.66.

"And these plaintiffs further say, that thereafter, on

> the 16th day of June, 1887, the said George Sidney Tyler, special master commissioner, as ordered by the decree of said court, but *without the knowledge and consent of these plaintiffs and without their authority*, did pay to the said Kebler, Roelker and Jelke, and the said Kebler, Roelker and Jelke received, the said sum of $11,361.66, and that no portion of the said sum has, been received by these plaintiffs or been accounted for to them.
>
> "And these plaintiffs say, that they were never parties to said cause in law or in fact, and that the said sale as to them is null and void."

Kebler was a cousin of Mrs. Robb, wife of the managing trustee. (Rec., p. 129.) Robb had known him for twenty years, since he was quite a young man. (Rec., p. 129.) When his father died, it was at Robb's suggestion that Kebler was chosen as administrator of the estate. (Rec., p. 129.) As such administrator, Kebler was party to the agreement of compromise which produced the money loaned to Loth on the security of the land involved in this suit. (Supplemental Record, pp. 1–3.) Loth borrowed this money from Kebler's father (Rec., p. 148), with whom Kebler was then associated. (Rec., p. 136.) The interest was always collected by Kebler and paid over to Mrs. Robb, the beneficiary of the trust, who

says, James Hampden Robb "always told me whenever I wanted money to go to Mr. Charles Kebler, and whenever I went to him I always got the money."

All these facts make it extremely probable that Kebler was authorized by Robb to appear in the suit, and intensify the strength of the presumption that, being a licensed practitioner and having entered appearance for defendants, he was authorized to do so. Against these facts and this presumption we have the bare denial of Robb, the denial of an interested party, for he is entitled to one-fourth of the trust fund after the death of Ellen N. Robb and Mary Robb (Supplemental Record, p. 3, paragraph 6), a denial first made nearly six months after he knew all that Kebler had done, and after, with such knowledge he had filed two cross-petitions, to one of which he swore, in which there can not be found a hint of any want of authority in Kebler, but which, on the contrary, throughout treat Kebler's acts as having been done "on behalf" of Robb and Strong.

This is very far from the "clear and unmixed case," the "prompt action," the "cogent and strong evidence," which public policy demands when a defendant, long after he knows judgment has been entered against him, by denial of the attorney's authority to appear for him, seeks to overcome "the sanctity of the records of courts," to the injury of innocent purchasers under the judgment.

The evidence, it is submitted, would not be sufficient to sustain the claim of appellants even in an action at law. But this is a suit in equity. Although the complainants waived verification to the answer of William Stix (Record, p. 68), nevertheless William Stix did verify on oath his amended answer (Record, pp. 106–108), on which the cause was tried.

"A complainant in chancery can not, by waiving a verification on oath to the defendant's answer, deprive such an-

swer, when made with such verification, of its ordinary effect."

Clements v. *Moore*, 6 Wall. 299, syllabus 5.

"Where the answer is responsive to the allegations of the complainant's bill, they must, to entitle him to relief, be sustained by the testimony of two witnesses, or of one witness, corroborated by circumstances which are equivalent in weight to the testimony of another witness."

Vigel v. *Hopp*, 104 U. S. 441.

In the case at bar, the answer is responsive to the allegations of the bill; it denies that "the acts done by Charles A. Kebler and the firm of Kebler & Roelker in said bill mentioned were done without the knowledge or consent of these complainants," and asserts "that they were done with the knowledge and consent and at the request of complainants." (Record, p. 106.)

Robb is not corroborated by another witness, nor by circumstances equivalent in weight to the testimony of another witness. Strong can not be counted as a witness corroborating Robb. Strong simply testifies that he never had any thing to do with the trust, except nominally to be a trustee, and that *he* never gave Kebler any authority. That in no way tends to show that Robb, the managing trustee, did not authorize Kebler to enter appearance in the suit. There is no corroborating circumstance whatever. None can be found in Kebler's alleged concealment of his acts from Roelker. Our opponents (Brief, p. 32) say: "Mr. Roelker, in his cross-petition in the Coppock case (Record, p. 163), expressly disavowed all knowledge of Kebler's connection with the *Gugenheim case*, and every thing contained therein, and alleged that the matter had been concealed from him by Kebler in his lifetime—the concealment covering a period of more than two years of the partnership relation." As a matter of

fact, that is not the language of the cross-petition at all. What Roelker alleged (Record, p. 163) is as follows: "And this defendant further says that Ferdinand Jelke and Herman L. Besuden, John F. Jelke and J. Hampden Robb and Robert F. Strong as trustees, Mary Russell, Elizabeth Sampson, claim to have had dealings with the said Charles A. Kebler, acting and professing to act as a partner of this defendant, whereby the said parties claim that the said partnership and this defendant became indebted to them and each of them; and this defendant says that he does not know and is unable to state the particulars of said transactions; that they were and each of them concealed from this defendant by the said Charles A. Kebler in his lifetime, and this defendant had no knowledge thereof until the death of said Charles A. Kebler."

The Gugenheim case is not even mentioned. How can it be claimed that Roelker was alleging that Kebler had concealed from him his want of authority to appear in the Gugenheim case, "and this defendant had no knowledge thereof until the death of said Charles A. Kebler," when, at the time Roelker filed this cross-petition, no one had ever set up the claim of such want of authority, and to this very pleading Robb and Strong filed the cross-petitions alleging that Kebler and Roelker had appeared for them, and had acted in their behalf, and that the proceeds of the judicial sale had been duly paid to them, their counsel? Roelker said: "They claim to have had dealings with the said Charles A. Kebler, acting and professing to act as a partner of this defendant." No doubt they did so claim, but the very marrow of their present claim is that they had had *no* dealings with Kebler. Roelker did not disavow knowledge and charge concealment of Kebler's entry of appearance in the case, but of his subsequent embezzlement of the money realized from the sale.

Roelker's disavowal of "all knowledge of Kebler's con-

nection with the Gugenheim case," if he had made it (which he did not), a case which was in their office over two years, in which they represented William Stix as well as Robb and Strong; in which young Tylor, an inmate of their office, was appointed master commissioner, and as such, with all the publicity and advertising necessarily involved, sold at auction over thirty thousand dollars worth of real estate—would have been simply incredible. Moreover, whatever construction be put upon the allegations of Roelker's cross-petition, is of no consequence, for, being mere *ex parte* statements by him in another case, they are not, as to any facts stated, evidence at all in this case. And in this connection it is a significant fact that, although Roelker's office was just across the street from the court-room, complainants did not call him as a corroborating witness on the trial.

B.

But, if Kebler originally entered the appearance of Robb and Strong as defendants in the Gugenheim case without authority, that authority was supplied, and his acts were ratified by them by filing the two cross-petitions in the Coppock cases.

Various reasons are urged why these answers and cross-petitions should not be held to be a ratification.

It is said the answer and cross-petition "was not a *suit begun* by Robb and Strong, but only a pleading filed in an action in which they had been summoned as defendants *for a limited purpose* by the cross-petition of Frederick G. Roelker;" that their appearance was not voluntary, as they were subject to constructive service by publication, and that "any attempt to prosecute their cross-petition would have been utterly futile and ineffectual, as much so as if the court had had no jurisdiction of the subject;" that "the portals of

that court were barred against them had they wanted to remain."

But it is not true that "the portals of that court were barred against them had they wanted to remain." They obtained leave to withdraw their answer and cross-petition, and then demurred to Roelker's cross-petition on the ground that they were not proper parties defendant to it, and thus got out of the case. No one else objected that they were not proper parties, and all such defects as want of proper parties, misjoinder of defendants, and misjoinder of causes are waived if objection be not made on such ground.

McCarthy v. *Garraghty*, 10 Ohio St. 438.

Roelker's cross-petition (Record, p. 163) said that Robb and Strong were necessary parties to the determination of the right of *himself and Coppock* in the subject-matter of the litigation. But his cross-petition stated no facts showing them to be necessary parties to any such determination, and therefore the demurrer was sustained. But Robb and Strong's own cross-petition did set out facts showing a claim upon the very real estate mortgaged by Kebler to Roelker to indemnify the latter for liability on account of the former's embezzlement and described in Roelker's cross-petition. By their cross-petition, Robb and Strong sought to be subrogated to Roelker's rights as mortgagee of the land described in his cross-petition, "by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt." (*Union Life Insurance Co.* v. *Hanford*, 143 U. S. 187, 190.) The prayer of the cross-petition (Record, p. 68) is "that it may be adjudged that these defendants are creditors of said firm of Kebler, Roelker & Jelke, and that the property in the petition and cross-petition of Frederick G. Roelker sought to be sold may be sold, and that out of the proceeds thereof said sum, $11,361, with interest from the 16th day of June, 1887, may

be paid to these defendants;" and also a prayer for personal judgment against Roelker and Jelke as surviving partners. Roelker's cross-petition sought to enforce his mortgage; the subject of his action was the land mortgaged, or the mortgage itself. Robb and Strong's cross-petition was a counterclaim seeking subrogation to that mortgage, asking that that land be sold and the proceeds paid to them. It related to the identical subject which was the subject of Roelker's action.

The Ohio statutes provide as follows:

"Sec. 5059. *What pleadings allowed.* The only pleadings allowed are:

"1. Petition.

"2. Demurrer.

"3. Answer, which, when affirmative relief is demanded therein, may be styled cross-petition.

"4. Reply."

"Sec. 5071. *Defendant may state different defenses, etc.* The defendant may set forth in his answer as many grounds of defense, counterclaim, and set-off as he has, whether they are such as have been heretofore denominated legal or equitable, or both; he may claim therein relief touching the matters in question in the petition against the plaintiff, *or against other defendants* in the same action, and each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer.

"Sec. 5072. *Counterclaim.* The counterclaim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, *or connected with the subject of the action.* (51 v. 57, sec. 94; S. & C. 979.)

Robb and Strong's petition was perfectly good; no one did or could object to it. So long as it remained on file it

was a waiver of any defects in Roelker's cross-petition. It was only after withdrawing it pursuant to leave obtained from the court (Record, p. 165) that they could demur to Roelker's cross-petition. All the court decided was that they were not necessary parties to the cause of action stated in Roelker's cross-petition; it never decided that Robb & Strong's cross-petition was not a perfectly proper counterclaim against Roelker. Roelker had not averred the necessary facts to compel them to try their right of subrogation in that suit, but they had a perfect right to come in and try it there. The prayer for personal judgment against Roelker and Jelke was probably improper, and it was doubtless for this reason that Robb and Strong issued no summons against Jelke; but the cross-petition so far as it was for subrogation to Roelker's rights as mortgagee was entirely proper and open to no objection by any party to the cause.

As to Roelker, a summons was not only unnecessary, but would have been "without reason."

In *Brown* v. *Kuhn*, 40 Ohio St., at p. 485, the Supreme Court of Ohio said:

"The statutes regulating pleadings, appeals and proceedings in error in force pending the action below were worded substantially, if not precisely, as the Revised Statutes. Section 5059 authorized a defendant to file an answer asking affirmative relief, to be styled a 'cross-petition.' The only provision for a summons upon a cross-petition is section 5074. Its object is to bring in as a defendant a person not at the time a party to the original action. Moreover, section 5097, fixing rule days for pleadings, directs that an answer to a petition shall be filed on or before the third Saturday 'after the return day of the summons,' while the answer to a cross-petition shall be filed on or before the third Saturday 'after the cross-petition is filed.' These sections imply that no summons is to go out upon a cross-petition except to bring some one into court who is not already there. To summon

those already in court would add materially to the cost of litigation without reason. The cross-petition can ask relief only 'touching the matters in question in the petition.' The same section (5071) that tells what a defendant may set forth in his answer includes the matter of a cross-petition. Every other defendant is warned to examine the court files, after the rule day for answer, for cross-petitions against himself, as fully as is the plaintiff in the action."

To the suggestion that the answers and cross-petitions of Robb and Strong were not suits *begun* by them, but pleadings filed in a suit to which they were defendants not voluntarily appearing, it is sufficient to reply that in so far as they were *answers*, this is true, but in so far as they are cross-petitions asking affirmative relief, Robb and Strong did voluntarily appear as plaintiffs and did *begin* suit.

It is also claimed that Robb and Strong were trustees of realty without power to convert into personalty, and therefore, that they could not ratify Kebler's act in consenting to its sale, because such consent was beyond their own power. If the premise were true, the conclusion might, perhaps, follow. But it is not true. The subject of the trust, which came into the hands of Robb and Strong, was not land, but money. The instrument creating the trust (Supplemental Record, p. 2, par. 4) says: "After paying the same, the remaining *moneys* in his hands and the *proceeds* of the sale of the land aforesaid, or so much as necessary, shall be set apart and invested for two trust funds." Nowhere is it provided that it shall be invested in land. Consequently, the trustees invested it in a mortgage, for the deed from and lease to Loth at a rental precisely equal to six per cent of the amount of the consideration named in the deed, were in equity simply a mortgage. That the property was worth much more than the $10,000 received by Loth, is shown by the fact (Record, p. 43) that it was appraised at $16,696, and sold at forced sale for $12,231. Loth testified that he "would not have

taken $10,000 as a *sale* at the time;" that he wanted to borrow money, and, hearing that Kebler had money to loan, went to him and this transaction resulted; that the deed and lease were part of the same transaction. (Record, p. 149.) The payments of rent were carried on his books as "interest on loan of Robb and Strong." (Record, p. 150.) It was understood between him and Kebler when he got the money "that it was a loan in the form of a lease." (Record, p. 151.) And Robb and Strong perfectly understood that it was merely a mortgage which they held, and in the case in the Superior Court, they began suit to foreclose it. (Supplemental Record, p. 17.) In their petition they said (Supplemental Record, p. 20): "And these plaintiffs further say that the said transactions between them and said Moritz Loth were in truth and in fact a loan by them to the said Moritz Loth of the sum of $10,000, in consideration whereof the said Moritz Loth conveyed to them the premises hereinbefore described, and they executed to the said Moritz Loth the lease hereinbefore described containing the privilege of purchase for the said sum of $10,000; and they say that in consequence thereof they have a first and best *lien* upon the premises in the said sum of $10,000, with interest thereon, and that there is and remains *due* and *unpaid* thereon the sum of $10,000, with interest thereon from January 1, 1885, at *six per cent* per annum. Wherefore the plaintiffs pray that the said claim may be established as a first and best *lien* on the said premises, and that unless the defendants shall pay to them the said sum of $10,000, with interest as aforesaid at a short day to be fixed by the court, that the said premises may be *sold* for the satisfaction of their said claim, and for such other and further relief as they may show themselves to be entitled in equity and good conscience." As stated by our learned adversaries (brief, p. 4), the petition in the Gugenheim case averred that Robb and Strong, trustees, "held the property only as se-

curity, and asked that the court so find." As that was the truth, they themselves, and Kebler as their attorney, were not only authorized but bound to admit it, and had perfect authority to consent to the sale of the land "for the satisfaction of their said claim."

That Kebler's alleged unauthorized entry of appearance was an act capable of ratification admits of no doubt. In *Ryan* v. *Doyle*, 31 Iowa, 53, it was decided that "an unauthorized appearance by an attorney in a case where there has been no personal service on the defendant may be so ratified by payment to the attorney for compensation for his services, as to confirm the jurisdiction and validate the judgment."

Conversely, it was decided in *Ancona* v. *Marks*, 7 H. & N. 686, that "a person may ratify an action brought in his name, but without his knowledge or authority, by another professing to act as his agent and on his behalf."

It is equally beyond question, we submit, that the cross-petition of Robb and Strong amounted to a ratification. Their language in terms says that Kebler and Roelker, *as partners*, "*entered the appearance of these defendants* in such cause, and filed an answer therein *on behalf of these defendants*." They do not say that Kebler, in fraud of Roelker (for a lawyer has no authority as against his own partner wrongfully to sign the firm name to an unauthorized entry of appearance), without their knowledge or consent, *purported to* enter the appearance of these defendants in such cause, and, without such knowledge or consent, filed an answer therein *purporting to be* on behalf of these defendants. So, also, they say that after May 10, 1887, "all steps in said cause *on behalf of these defendants* were taken by the *firm* of Kebler, Roelker & Jelke;" that "such proceedings were afterward had in said cause, that the said premises *were sold free of the claims of these defendants and of all other persons whoever*;" than an order was made in the cause "to pay to these defendants, or *their counsels, Kebler, Roelker & Jelke*, out of the proceeds of said

sale, the sum of $11,361, and these defendants further say that said sum was duly paid on the 16th day of June, 1887, to said firm of Kebler, Roelker & Jelke;" that no portion *thereof* has been paid to these defendants or accounted for to them." Wherefore they pray "that it may be adjudged that these defendants are *creditors* of said *firm* of Kebler, Roelker & Jelke," and for subrogation to Roelker's rights as mortgagee. This language, with its reiteration of "on behalf of these defendants;" its statement that the premises had been sold "free of the claims of these defendants and of all other persons whoever;" its speaking of a payment ordered to be made to "their counsels, Kebler, Roelker & Jelke," and of its having been "duly paid" to that firm, but not "accounted for" to them—would be sufficient, if found in the most casual, informal writing, or mere speech of theirs, to show ratification of what had been done in the suit. But when found in so solemn an instrument as a sworn pleading affirming that the premises had been sold "free of their claims," and therefore praying that they should be adjudged creditors for the proceeds "duly paid" to Kebler, Roelker & Jelke, and not accounted for by them, and through subrogation, for foreclosure of Roelker's mortgage, and payment to them of the proceeds of foreclosure, its force as a ratification is irresistible.

It is suggested by our learned adversaries (Brief, p. 35, pp. 57–58) that common-law pleadings being abolished in Ohio, the character of the action brought by the cross-petitioners is not clear; and it is said (p. 58) that "the prayer that Robb and Strong be adjudged creditors of the firm of Kebler, Roelker & Jelke is perfectly consistent with a claim founded *in tort* upon the wrong done in consenting to a sale through Kebler which despoiled the trustees of this property." The character of the action is clear beyond a peradventure, and the suggestion of counsel is untenable for a twofold reason, either branch of which is conclusive. Even in

Ohio, you can not recover *in tort* without charging a wrongful act in your petition. Robb and Strong would not be permitted to recover damages for a wrong done by Kebler in consenting to a sale, without averring that Kebler had wrongfully consented. The cross-petitions not only do not say that Kebler *wrongfully* consented, they do not even aver any consent by him at all. All they say is that after May 10, 1887, "all steps in said cause *on behalf of these defendants* were taken by said firm of Kebler, Roelker & Jelke, and by none others, and these defendants further say that such proceedings were afterward had in said cause that the said premises were sold free of the claims of these defendants and of all other persons whoever."

And secondly, even in Ohio, if your petition, in tort, *does* charge a wrongful act, you can not recover unless you charge and *prove* that it was done by *defendant*. Waiving the question whether Roelker would be liable for Kebler's alleged torts in entering appearance without authority, or wrongfully consenting to a sale, clear it is that the surviving partners of Kebler, Roelker & Jelke would not be liable for those torts, for, when (if ever) they were committed, there was not and had not yet been any such firm in existence. The entry of appearance, signed Kebler & Roelker, bears date November 19, 1885 (Supplemental Record, p. 4); the consent to the sale of the premises in fee simple is found in the answer filed July 24, 1886, and signed Kebler & Roelker (Record, pp. 36–7); the property was sold April 16, 1887 (Record, p. 42); the firm of Kebler & Roelker was dissolved and the firm of Kebler, Roelker & Jelke was formed May 10, 1887, as stated in the cross-petitions themselves.

The indemnity mortgage to which Robb and Strong sought to be subrogated was given to Roelker, June 23, 1887 (Record, p. 162), the said Kebler & Roelker, "at and before June 23, 1887," being "partners as attorneys at law" (Record, p. 161). It was a deed with an oral defeasance, and was

given, *inter alia*, "to indemnify" Roelker "against any loss that he might sustain or liability that he might be under by reason of the business of said partnership" (Record, p. 163). Roelker was a man of means; Jelke had nothing but expectations from his father (Record, p. 139). The firm of Kebler & Roelker having been dissolved and the firm of Kebler, Roelker & Jelke having been formed as its successor, May 10, 1887, as alleged in the cross-petitions (Record, p. 67), "thereafter all steps in said cause taken on behalf of these defendants were taken by said firm of Kebler, Roelker & Jelke, and by none others." These subsequent steps consisted solely of the receipt of the proceeds of sale pursuant to the decree of confirmation entered May 19, 1887 (Record, p. 49).

And these facts show that Robb and Strong were not and could not have been suing for Kebler's wrongful entry of appearance or consent to a sale, but were, in affirmance of the appearance and sale, seeking an adjudication that they were creditors of Kebler, Roelker & Jelke for money, the proceeds of the sale, by them had and received as their agents, but not accounted for, and of subrogation to Roelker's mortgage of indemnity against "any liability he might be under by reason of the business of said partnership." Their action was entirely inconsistent with the position they now seek to maintain, of repudiation of Kebler's authority; it was a complete ratification of his acts now claimed to have been unauthorized. We do not even have to invoke the aid of the rule laid down in Story on Agency, § 253, that on the question of ratification "the acts and conduct of the principal are construed liberally in favor of the agent."

In *Merrill* v. *Rokes*, 54 F. R. 450 (Circt. Ct. of Appeals), the second cause of action was "for damages for the negligence of the defendant, as his agent, in failing to collect two promissory notes, which amounted in the aggregate to $1,925, made by one Mooney and payable to the order of the plaintiff." (P. 451.) The defendant's alleged negligence related

to his conduct in reference to certain notes of Taylor and O'Brien, pledged with defendant as collateral security for the Mooney notes. Instead of collecting these Taylor and O'Brien notes, defendant had exchanged them for a stock of goods, which was put in Mooney's charge as trustee.

Litigation ensued, the stock of goods was sold in attachment proceedings, but Mooney finally recovered judgment, and the proceeds thereof yielded defendant $1,820.56, produced by the sale of the stock. All this had involved payment of attorney's fees and expenses by defendant. Plaintiff repudiating defendant's acts as his agent, denying any obligation for the attorney's fees and expenses incurred, sought to recover damages for defendant's negligence. But plaintiff had previously demanded the $1,820.56, claiming it as his. It was held that this demand operated as a ratification of defendant's acts, and barred the present action for negligence. The court, at pp. 454–5, said:

"The plaintiff now insists that he is entitled to recover of the defendant all of this $1,820.56. This is a portion of the proceeds of the Mooney judgment, and the defendant claims that to procure it he was compelled to incur and pay attorneys' fees and other expenses, and that he ought to be permitted to retain out of the proceeds the amounts he so expended. If in procuring the possession of the stock and obtaining the Mooney judgment he necessarily incurred any reasonable expenses and attorneys' fees, and the plaintiff asks to recover of him this money which these attorneys' fees and expenses earned, the defendant is obviously entitled to set off and retain them for his reimbursement. The principal can not take the benefits and repudiate the burdens of his agent's acts. If he ratifies that which favors him, he ratifies the whole. *Gaines* v. *Miller*, 111 U. S. 395, 398; 4 Sup. Ct. Rep. 426; Story, Ag., secs. 333, 336; *Skinner* v. *Dayton*, 19 Johns. 513, 554. On July 28, 1890, the plaintiff served on the defendant a written notice, in which he claims

that the Mooney judgment and its proceeds are his, and demands of the defendant 'the said sum of $1,820.56, so received out of the said Mooney judgment, and for all interest accruing for the same, to wit, interest at the rate of ten per cent per annum from January 28, 1888, less all legal claims which you may have against me for attorneys' fees or other costs justly incurred in the litigation connected with my said claim against the said Mooney.' *This demand*, which was urged at the trial, and was the basis of the plaintiff's recovery, *was a ratification* of the acts of the defendant on his principal's behalf up to the sale on January 28, 1888, and left nothing in issue between the parties relative to their transactions prior to that date but the amount of the attorneys' fees and expenses the defendant had incurred in his principal's interest."

In *Ryan* v. *Doyle*, 31 Ia. 53, already referred to, the unauthorized appearance of an attorney for defendant in a case, in which there had been no personal service, was held to have been ratified by payment of compensation to the attorney for his services, so as thereby to confirm jurisdiction and validate the judgment previously invalid.

In *Jones* v. *Atkinson*, 68 Ala. 167, the facts were a little complicated, sufficiently so, it seems, to cause our learned opponents (Brief, pp. 61, 62) curiously to misapprehend the point actually decided.

"The suit was brought by R. W. Atkinson against D. P. Jones to recover one mouse-colored mule named *John*." Trial was had on issue joined on the plea of *non detinet*. "On the trial, as the bill of exceptions shows, it was proved that, in January, 1878, the plaintiff hired or rented a mule which he owned, named *Jerry*, to one, Pritchett, for the year 1878 for $25; that in August of that year, with the knowledge and assent of the plaintiff, Pritchett traded said mule with one Henderson for the mule now sued for (*i. e.*, *John*); that a short time afterward, during the same year, Pritchett

traded said mule (*i. e., John*) with one Lindsey Clanton for a mare, called the Clanton mare, and that Clanton afterward sold or traded said mule (*i. e., John*) to the defendant in this suit." Pritchett afterward traded the Clanton mare for still another mule, but that had nothing to do with the point decided by the Supreme Court. Plaintiff refused to accept the Clanton mare, denied Pritchett's authority to trade *John* for her, and brought suit in trover against Jones, who had possession and claimed ownership of *John*. The question was whether Atkinson had ratified the unauthorized exchange of *John* for the Clanton mare. One witness for defendant testified "that plaintiff had offered to trade the Clanton mare to him while Pritchett had her; and another that plaintiff told him to go and trade with Pritchett for the mare." This was denied by plaintiff. The defendant asked the court below to charge the jury that "if they find that Pritchett afterward traded the mule *John* for a certain mare, and while said mare was in possession of Pritchett, plaintiff claimed her as his property and offered to trade her, this was, in law, a ratification of the trade of *John* for the mare, and he can not recover in this suit." The court refused to give this charge, and the defendant excepted to its refusal; and he now assigns said refusal as error."

We have quoted the facts at such length to show that the case did not involve and the court did not decide any such proposition as our learned adversaries (Brief, pp. 61, 62) say the Supreme Court held. The judgment below in plaintiff's favor was reversed for refusal to give the foregoing charge asked by defendant. At pages 169–170, the court said: "Now the only claim Atkinson could have or assert to the mare rested on the title he acquired by the exchange of the mule *John* for her. This claim, if he made it, rests alone on the fact that she stood in the place of the mule *John*. If he claimed the mare, and if he asserted and attempted to exercise acts of ownership over her this was a ratification, and being once

made, he could not revoke it, unless it was made under a misapprehension of the facts. His right and claim to the mare had no foundation to rest on, unless he had parted with right and claim to the mule. He could not claim both, and claiming one he renounced the other."

In *Woodward* v. *Suydam*, 11 Ohio, 360, it was held that:

"Where a commission merchant, from time to time, sends an account of sales to his principal, who makes no objection to the sales, and draws for the balance of the account rendered, it is a ratification of the sale, and the principal can not recover for any alleged violation of his instructions as to the terms of sale."

It does not appear whether the draft for balance of account was paid or not.

Rule 6 of the Rules of the Supreme Court of Ohio provides that:

"A syllabus of the points decided by the court, in each cause, shall be stated in writing by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the facts of the cause that have been determined by the court. And the syllabus shall be submitted to the judges concurring therein for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein."

In *Frank* v. *Jenkins*, 22 Ohio St. 597, which our learned opponents (Brief, p. 51) say, is an interesting and well considered case, syllabuses 2 and 3, are as follows:

"2. An action by the owner of goods, to recover their price and value from his agent, who, without proper authority, has consigned them for sale on commission, and received advances upon them, is *prima facie* evidence of a ratification of the consignment.

"3. Goods were consigned by an agent, without proper authority from the owner, for sale on commission by the con-

signees, who, in good faith, advanced money upon them to the agent, supposing him to be the owner of the goods. While the goods were in transit, the owner replevied them from the carrier, and also brought an action against the agent to recover their price and value. In an action of replevin, subsequently brought by the consignees against the owner, to recover possession of the goods, it appearing that the owner's said action for their price and value was still pending, and there being no evidence that it was brought or prosecuted under any mistake of the facts: Held, that under the circumstances, the owner was estopped from denying the authority of his agent to make the consignment."

It will be observed that the language is *an* action; the second action for the price brought in Boston, in which an *attachment* issued, is not even referred to in the syllabus. Counsel for Frank in that case argued (p. 600) of the suit in replevin, and the suit for the price, that "the one suit said 'yes' and the other 'no' at the same time; the one act neutralized the other." But the court held the suit for the price to have been nevertheless a ratification.

Our learned adversaries (Brief, p. 53) quote from the opinion of the court (pp. 603–4) the following passage: "It is well settled law that an action by the owner for the price or purchase money of goods sold by an unauthorized agent may be regarded as, and *prima facie* is, a ratification of the sale." They continue by saying, "Then the court states instances, like those in our case, when such an action would *not* be *prima facie*, or at all, a ratification," quoting language from p. 605. They judiciously skip the "interesting and well considered" remarks on p. 604, immediately following the passage first quoted. The remarks entire are as follows:

"It is well settled law that an action by the owner for the price or purchase money of goods sold by an unauthorized agent may be regarded, and *prima facie* is, a ratification of the sale.

"The transaction in question was not, strictly speaking, a sale of the cotton, but it was in the nature of a sale, and should be subject to the same rules of law in regard to acts of ratification and disaffirmane by the owner. It was a shipment of the cotton for sale on commission, with an advance of part of the purchase money. It was more than a pledge. It was a pledge with an irrevocable power to sell and reimburse the money advanced and the freight and commission. No reason can be shown why in such a case, equally as in a case of simple sale, the well known rule of law in regard to ratification should not apply.

"The reason which underlies the rule is in both cases the same, namely, *that a third person has an interest in the property, which it is in the power of the owner either to defeat or to ratify at his option.*

"Such third person, as it were, is at the mercy of the owner. Justice, therefore, requires that he should make his election *at once, and adhere to it* when fully and fairly made. If the owner repudiates the sale, the purchaser must seek his remedy against the unauthorized agent. If the sale is ratified by the owner, the purchaser must pretermit his remedies against the agent, and assert his right to the property." (Italics ours.)

In the case at bar Robb and Strong not only did not promptly repudiate Kebler's acts upon full knowledge of all the facts, but for six months thereafter kept silence as to his alleged want of authority, and by their cross-petitions continuously asserted that his action had been "on their behalf," and that they were entitled to the money in the hands of his surviving partners as their money "not accounted for to them."

In this connection the language of this court in the case of *Leather Manufacturers Bank* v. *Morgan*, 117 U. S. 96, 114, 115, is extremely pertinent.

Speaking of the duty of a depositor to use diligence to

discover, and upon discovery, promptly to notify his bank of forgeries committed by his clerk in raising checks signed by the depositor, this court, through Mr. Justice Harlan, at pp. 114, 115, said:

"Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the baak from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, can not be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, properly sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, in effect to falsify a stated account, to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it."

Here the action is by Robb and Strong to falsify the solemn records of a court to our injury, and our defense is

that they have, by express affirmation, as well as by conduct, ratified the acts of their agent, thereby preventing any steps being taken for redress against the agent for his alleged unauthorized acts.

Nor did the court, in *Frank* v. *Jenkins*, "then state instances, *like those in our case*, when such an action would not be *prima facie*, or at all a ratification." It said, "if either of the actions by Frank was brought under mistake, it was his duty, under the circumstances, promptly to dismiss or abandon it upon discovery of the mistake." In our case Robb and Strong filed their cross-petitions with full knowledge of all the facts. There was absolutely no mistake. They have not since, to this day, learned a fact they did not then know.

In *Wilson* v. *Wilson*, 30 Ohio St. 365, the plaintiff sued defendant before a justice of the peace upon a promissory note made by defendant's wife while sole. Defendant proved a divorce before suit brought, so that judgment went for defendant. Plaintiff appealed to the Common Pleas, and there filed a petition upon a different cause of action declaring upon a special promise, whereby defendant had agreed, for valuable consideration, to pay, and plaintiff to receive, a less sum in satisfaction of the note, and explaining that he had brought the suit before the magistrate because defendant had repudiated the special agreement. The court held, first, that the cause of action declared on in this petition being an entirely different one from that sued on before the magistrate, the Common Pleas acquired no jurisdiction on appeal; but, secondly, that defendant, instead of demurring for want of jurisdiction, having demurred to the petition generally, had submitted to the jurisdiction, and thus the Common Pleas had original jurisdiction of the case made by the petition there filed. Thirdly, the court reversed the judgment of the Common Pleas for instructing the jury that the suit brought before the magistrate would not prevent a recovery on the special contract. The Supreme Court, at pp. 373, 374, said:

"In so instructing the jury, we think the Court of Common Pleas erred. The plaintiffs below, in their petition, say that the defendant repudiated the special contract, and that they, upon learning that fact, brought their action before the justice, as they well might. It is quite true that when the defendant below refused to abide by and perform the alleged contract, the plaintiffs below had a right to regard it as rescinded. They had a clear right of election. They might either abide by the special contract and bring their action to recover for its breach, or they might acquiesce in the repudiation of it by the other party and bring their action on the note, and recover, if they could, the full amount of principal and interest due thereon. They chose the latter alternatixe, and *brought suit upon the note.*

"And by *that* election freely made, they must be conclusively bound. Having chosen to abandon the special contract, and try the chances of recovering a larger sum upon the liability of the defendant as the husband of their original debtor, they can not, when this cause of action fails, fall back on the special contract to which they have put an end by a conclusive act of disaffirmance. Plaintiffs below had alternative remedies, but not remedies to be enforced alternately. The insuperable difficulty in the case of plaintiffs below is not that their cause of action before the justice was a *different* one from that stated in their petition, but that *suit* upon the former necessarily implies a rescission and abandonment of the latter." (Italics ours.)

Of this case, our learned adversaries (Brief, p. 64) say that the court held that, "having brought suit on the promissory note for the larger sum, and prosecuted it to *judgment*, they could not afterward have recourse to the special contract." Firstly, the plaintiff had not "prosecuted his suit to judgment," for the judgment was against him—for defendant; deciding that defendant had become released from liability upon it, but leaving the note valid as a contract

not merged in any judgment. Secondly, there was no judgment in existence, for in Ohio an appeal vacates the judgment, leaving the case to be tried *de novo* in the appellate court, where the pleadings may be amended and the issue is tried upon any testimony that may be offered, just as though there had never been a trial in the court below. The case was in the Common Pleas as a court, not of *appellate*, but of *original*, jurisdiction. The plaintiff failed not because judgment had gone against him in the suit upon the note—a judgment vacated by the appeal—but because, judgment or no judgment, *suit* upon the note necessarily implied a rescission and abandonment of the rights under the special agreement.

In *Benedict* v. *National Bank of the Commonwealth*, 4 Daly, 171, "the plaintiff having been indnced to make a loan on call on the security of forged bonds, after discovering the fraud, sued on the contract, and attached the money standing to the credit of the borrowers in the bank in which they had deposited the proceeds of the fraudulent loan, but proceedings in bankruptcy having been taken against the defendants in that suit, he discontinued and brought an action of tort against the bankrupt and his assignee in bankruptcy, claiming that the money in the hands of the bank was the identical money obtained from him by fraud, and that he was entitled to it as owner: *Held*, that by the proceedings in the first suit he had elected to affirm the contract and was barred from bringing a second suit founded in tort." At pages 175–6, the court said: "I think plaintiff exercised and manifested his election *in bringing his action on the contract* [not "in levying an attachment"], and that the subsequent discontinuance of the proceedings then taken could not change the legal effect of his action. He had full knowledge of the fraud, and the decision then made, although it might have been influenced, could not be impaired, by his want of knowledge as to what disposition had been made of the proceeds of the

checks. Having in the first instance treated the fund as the property of the debtors, he can not now escape the consequences of his own deliberate act, nor prejudice the rights of other creditors to the fund." In our case, Robb and Strong, by their cross-petitions, seeking as creditors of the firm subrogation to Roelker's mortgage, treated the real estate as ours; and its proceeds as money in the hands of their own agents; and can not now escape the consequences of their own deliberate act, nor prejudice the rights of innocent purchasers of the land.

In the case just cited (see at p. 174), counsel for plaintiff argued that "if the act of the plaintiff may be deemed an agreement to waive the tort, it was certainly an agreement coupled with a condition, the condition being to waive it, provided he could retain his attachment. Being deprived of that, the condition failed, and the agreement and election fell with it and became void." But the argument failed to prevail with the court.

Precisely the same argument is made by our learned opponents. In their brief (p. 34), they say: "Even had Robb and Strong desired to make an election, they had not sufficient knowledge of Kebler's estate and of the value of Roelker's security to enable them to have made an intelligent choice. Kebler's affairs were in dire confusion."

They were; and Robb and Strong knew it when they filed their cross-petitions, for Coppock's petition advised them of it.

In their brief (p. 37), they say, "the filing of the answer and cross-petition of Robb and Strong in the Coppock case should be regarded only as a conditional ratification," using almost the identical language of the argument unsuccessfully urged in the case last cited. This sums up in a sentence the suggestion running through their entire brief that they filed their cross-petitions under some mistake. But there was no

mistake. When they filed their cross-petitions they had as full information of all of Kebler's acts "on their behalf" as they have to this day. Kebler's affairs were in confusion, and they knew it. There may have been uncertainty as to the amount of Kebler's estate, and of the value "of Roelker's security;" but upon this they chose to speculate for six months, while we were at their mercy, and this choice concluded them. (*Supra*, pp. 31–32, and *Heller* v. *Elliott*, 45 N. J. L. 564, *infra*, pp. 38–39.)

In *Wilmot* v. *Richardson*, 4 Abb. App. Dec. 614, it was held that:

"A seller of merchandise, with a lien for the price, who, with knowledge that the buyer has obtained advances upon consignment to factors abroad, sues the buyer, on contract, for the price, thereby ratifies the sale, and can not afterward recover against the consignee in an action for money had and received."

At pp. 616, 617, the court said:

"On May 20th, three days after Wilmot's interview with the defendants and Patterson, the plaintiffs commenced a suit against Patterson for this demand for goods sold and delivered. They obtained an attachment upon an affidavit of the plaintiff, Wilmot, in which he swears that Patterson is indebted to the plaintiffs in over ten thousand dollars for this flour sold and delivered to him on May 12th. There is not one word of qualification or explanation of that suit or of that affidavit. Was not the sale and delivery then fully ratified by that suit? I think it was. *Morris* v. *Rexford*, 18 N. Y. 552. This, it will be observed, was directly after the whole matter was consummated. Whether the delivery was qualified or absolute—whether the sale was fraudulent or fair—the plaintiffs by this affidavit and proceeding elected to hold it by an action a consummated sale an actual, absolute delivery."

The report does not show whether or not the attachment was ever levied.

In *Thompson* v. *Howard*, 31 Mich. 309, it was held that:

"A party may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

"The doctrine of election is applied in this case to preclude one from bringing an action in case for the unlawful enticing away and harboring his minor son, after he had first brought *assumpsit* for the son's wages during the same period on the basis of an implied contract, and after a trial, had submitted the case to the jury, and upon their disagreeing had *discontinued the suit.*"

At page 312 the court said:

"His proceeding necessarily implied that defendant had the young man's services during the time *with plaintiff's assent*, and this was absolutely repugnant to the foundation of this suit, which is that the young man was drawn away and into defendant's service *against the plaintiff's assent.*" (Italics are the courts.)

We submit that no valid distinction can be drawn between discontinuing a suit after a mistrial and withdrawing a petition pursuant to leave of court after it has been on file for months.

In *Heller* v. *Elliott*, 45 N. J. L. 564, it was held that:

"The making of an affidavit in attachment by a vendor of goods, and the issuing of the writ thereon, constitute a waiver of the right to reclaim the property, and are an affirmance of the sale."

After the attachment by plaintiffs the property was re-

plevined by one claiming as innocent purchaser for value from the vendee. The court said:

"The plaintiffs then discontinued their attachment and brought suit to recover the value of the goods on the ground that inasmuch as they were sold for cash, to be paid on delivery, and the price was not paid, no title passed by the delivery. The judge at the circuit nonsuited the plaintiffs on the ground that they had waived their right to reclaim the property, and had elected to treat the sale as absolute and unconditional. The evidence of the waiver and election was the making, by Heller, of the affidavit in attachment and the issuing" [not the "levying"] "of the writ. That these acts constituted a waiver of the right of reclamation and were an affirmance of the sale there can be no question. The plaintiffs, however, urge that they were done in ignorance of the facts, and that therefore they ought not to be held to be evidence of waiver or election. But the evidence is that the reason why the plaintiffs did not have recourse to the remedy of reclamation was that they supposed that the goods were out of reach, and they therefore chose to proceed by attachment to recover the price. They were properly held to be bound by their action. The judgment of the Supreme Court should be affirmed."

In *Dibblee* v. *Sheldon*, 10 Blatchford, 178, the syllabus is:

"Where a vendee purchases goods by means of such fraudulent representations as entitle vendor to disaffirm the sale and reclaim the goods as his own property, and the vendor, after discovering the fraud, voluntarily brings an action on the contract of sale and purchase, to recover the contract price, that is, as matter of law, an affirmance of the sale, and the vendor can not thereafter set up title, and claim the goods, on the ground of the original fraud."

At page 179 the court stated the point for decision as follows:

"The single question raised by the bill of exceptions in

this case is this: Where a vendee purchases goods by the means of such fraudulent representations as entitle the vendor to disaffirm the sale and reclaim the goods as his own, and such vendor, after discovering the fraud, voluntarily brings an action on the contract of sale and purchase, to recover the price, is that, as matter of law, an affirmance of the sale, or may he thereafter set up title and claim the goods, on the ground of the original fraud?"

It will be observed that the fact that the defrauded vendor in his action on the contract for the purchase price had caused an attachment to issue and be levied, is not even mentioned as a factor in the statement of the problem for solution. At pages 180, 181 the court said:

"It is the fact that the vendor elected his remedy, and acted affirmatively upon that election, that determines the point in issue, and not the *extent* to which he pushes his election; and I am not aware of any sufficient ground for saying that he is not concluded *until he has recovered judgment.*" (Italics ours.)

In *Littlefield* ads. *Brown*, 1 Wend. 398, the plaintiff had taken his debtor in execution, but the sheriff suffered a voluntary escape previous to the return of the *ca. sa.* However, the sheriff committed the prisoner to the liberties of the jail at the return of the execution. More than a year afterward the prisoner again left the limits of the jail and remained absent. This action was for the second escape. But it appeared that plaintiff had previously sued the sheriff for the first escape. That action had not been pressed, and judgment as in case of nonsuit for not bringing it to trial had been entered. Yet the mere *bringing* of that suit was held an election barring the present suit. The plaintiff originally had a right to look to the sheriff for damages for the escape, treating the prisoner as out of custody, or to pursue the prisoner treating him as still in execution; but he could not do both.

The court, at pages 404, 405, said:

"In the case of *McElroy* v. *Mancius* (18 John. R. 122), the court, referring to the case of *Rawson* v. *Turner*, considers it as deciding that the *bringing* of a suit is the determination of the plaintiff's election, which he had, either to consider the prisoner out of custody or in execution. . . .

"From the principles established in the latter case, it follows that the bringing of a suit against a sheriff, is an election on the part of the plaintiff to consider Hopkins out of custody. It would be idle for a plaintiff to prosecute the sheriff for an escape, when in truth no escape had happened; but is the commencement of such a suit to conclude the plaintiff? The commencement of a suit seems to be an assertion by the plaintiff that a right of action exists, that an escape has taken place. It is also the determination of the election of the plaintiff, to look to the sheriff, and of course not to pursue the original defendant." (Italics are the court's.)

It will not be claimed, we presume, that suffering a nonsuit for not bring the case to trial is "prosecuting the suit to judgment."

This case was affirmed in 11 Wendell, 467, by the Court for the Correction of Errors, twelve members voting for affirmance and seven for reversal. But the dissenting judges did not dissent upon this point.

In *Rodermund* v. *Clark*, 46 N. Y. 354, the head note is as follows:

"Where a party has an election between two inconsistent remedies, he is confined to that which he first chooses.

"W. and defendant were joint owners of a sloop. Defendant, ignoring W.'s rights, sold the whole vessel to M. W. after the sale, took and retained possession. M. thereupon libeled the vessel, as owner, in the United States District Court. She was seized by the marshal, and M., having obtained judgment by default, she was delivered to him. W.

assigned his interest, and also his claim against defendant, to plaintiff, who sues for conversion.

"Held, that W. having elected to assert his rights, by retaining possession and refusing to recognize the sale, he and his assignees were precluded from maintaining an action for the conversion."

At page 357 the court said:

"Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. (*Morris* v. *Rexford*, 18 N. Y. 552.) Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies."

In *Conrow* v. *Little*, 115 N. Y. 387, at pp. 393–4, the court said:

"The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practiced by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of 'a breach of contract to pay for goods and money loaned obtained by fraud.' The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one,

the whole estate of the debtor is pursued in a summary manner, and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practiced by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election. The principle applied in *Foundry Company* v. *Hersee*, 103 N. Y. 26, and *Hays* v. *Midas*, 104 Id. 602, require this construction, for the present contains the element lacking in those cases, viz., knowledge of the fraud practiced by the vendee; and by reason of it the plaintiffs were put to their election.

"It is not at all material to the question that the plaintiff discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed, *and it is of no consequence whether or not the plaintiffs made their choice effective.*"

True, an attachment had been issued and levied in the case, but that fact is referred to simply as showing that plaintiffs made their election with full knowledge of the facts, the allegations of the affidavit upon which the attachment was procured proving such knowledge. This appears from the remark of the court that "they then knew of the fraud practiced by him, and disclosed that knowledge in the affidavit on which the attachment was granted;" and the further statement that "it is of no consequence whether or not the plaintiffs made their choice effective."

In *Bach* v. *Tuch*, 126 N. Y. 53, it was held that:

"Where a vendor, who has been induced by fraudulent representations to sell his goods, elects to ratify the sale after knowledge of all the material facts, such election will be conclusive, although at the time he makes it he is ignorant that his vendee has made similar fraudulent representations to others, by which he had obtained property from them.

"It is not necessary, in order to make the election conclusive, that the party electing shall be acquainted with all of the evidence which may tend to prove the fraud; it is sufficient if he has knowledge of all the material facts showing the actual perpetration of fraud upon him. *Hays* v. *Midas*, 104 N. Y. 602, distinguished.

"Plaintiff sold certain goods to M., defendant's assignor, on credit. Before the term of credit expired, M. made an assignment for the benefit of creditors to defendant. Plaintiffs immediately brought an action against M. to recover the purchase-price of the goods, and caused an attachment to be issued therein, the complaint and affidavits alleging that the sale was induced by false and fraudulent representations on the part of M. The attachment was vacated, and thereupon said action was discontinued. This action was thereafter commenced to recover possession of the goods sold, on the ground that M. purchased with a fraudulent intent not to pay for the goods. Plaintiffs proved false and fraudulent representations made by M. to other parties, which they claimed were not known to them when the first action was commenced. Held, that plaintiffs, by their first action, made an election which ratified the sale to M., and so they could not maintain this action; that ignorance of the representations made to others at the time of the bringing of the first action did not destroy its effect as an election; also, that a charge in the second action of fraudulent intent at the time of the purchase not to pay did not constitute a separate fraud."

In this case, also, an attachment had issued, but again that fact is referred to by the court (see at pp. 56, 57) only as proving, by the affidavit upon which it was obtained, that when the plaintiffs made their election by bringing the first suit they did so with full knowledge of all the facts.

In *Butler* v. *Hildreth*, 5 Met. 49, it was held that "an assignee of an insolvent debtor," under the insolvent law of 1838, "may affirm a sale of goods made by such debtor for the purpose of delaying or defrauding his creditors, and receive the price of the goods from the vendee. And if such assignee, knowing all the facts of the case, brings an action against the vendee, on a note given by him for the price of the goods, and secures the demand by an attachment of his property, he thereby so far affirms the sale, and waives his right to disaffirm it, that he can not, by discontinuing such action, and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them.

At page 51, the court said: "It would, we think, be going too far to say that merely demand of the price would be deemed a waiver of his right to avoid the sale and claim the goods; because, in many cases, if the price could be obtained, it would be equally beneficial to the creditors, and he would have no farther occasion to pursue the harsher remedy of impeaching the sale. But we think that, if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act, too, deeply affecting the rights of the purchaser, whilst it is an assertion of his own; and if done with a knowledge of all the facts which ought to influence him in his election, it is conclusive."

Our learned adversaries seem to think that this is equivalent to a decision that a suit for the price without an attach-

ment would not be proof of an election, but we submit that it is not. It holds that a mere demand for the price would not, and that suit for the price with an attachment would be such proof, leaving untouched the question of the effect of a suit for the price persisted in for months.

In *Connihan* v. *Thompson*, 111 Mass. 270, at p. 272, the court said: "The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."

Mechem on Agency, § 151, says that: "One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon such an act."

Our learned adversaries (Brief, pp. 44–45) further quote from the opinion of Chief Justice Shaw, in *Butler* v. *Hildreth*, *supra*, his remarks as to the result when it appears that the election was made under a mistake of *fact* relating either to the right or the remedy. Those remarks conclude with the statement entirely applicable to this case: "But no mistake of fact of any kind was suggested in the present case." The plaintiffs do not show a single fact now within their knowledge which they were unaware of when they filed their cross-petitions.

In *Scarf* v. *Jardine*, 7 App. Cas. 345, "A firm of two partners dissolved; one retired and the other carried on the business with a new partner under the same

style. A customer of the old firm sold and delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate, and afterward brought an action for the price against the late partner.

"Held, reversing the decision of the Court of Appeal, that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might, at his option, have sued the late partner or the members of the new firm, but could not sue all three together; and that having elected to sue the new firm he could not afterward sue the late partner."

At page 353, Lord Selborn, L. C., says:

"The question is, which I originally stated, namely, whether it is possible, after choosing to hold those who actually gave the order and received the goods liable, and proceeding against them as debtors in such a way as to amount to a distinct election to take their liability, to retract that and to fall back upon the liability which, on a different principle, might have been asserted against the other two, that is to say against Scarf and Rogers, to the exclusion of Beech. I think that the plaintiff was bound by his election, and that after approbating the liability according to the facts, and taking as his debtors those who had actually given the order, he could not, when it suited his convenience, retract it, reprobate it, and go back upon the liability, by estoppel of the man who never gave the order at all."

At pages 360–362, Lord Blackburn, after referring to *Jones* v. *Carter*, 15 M. & W. 718, as "most neatly stating the point," says:

"The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a mem-

orandum, or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and *whether he intended it or not*, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way—and would not be justifiable if he had elected the other way the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. In *Jones* v. *Carter* (the principle is general though the particular application is peculiar) the question was whether a man who had a right to avoid a lease had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which in modern times you do not actually enter; but it had proceeded so far that the defendant had entered into a consent rule; and the defendant having entered into a consent rule by which he had admitted the entry, the court held that it must be taken as if the plaintiff had entered, and that inasmuch as the entry to avoid a lease was unequivocal in its nature he could not afterward say 'the lease was not void.'

"Now that is the question which I think the court below ought to have decided and which I think your lordships now, having power to find all the facts, have to decide upon the evidence. Was there, before the 30th of September, which was the date when the plaintiff first came upon Scarf, an unequivocal election to take Beech as his debtor? I do not think that at first there was. I do not think that the mere fact of his having continued to enter in his books these goods along with others which he had undoubtedly contracted to supply after the 25th of February, when he had full notice (entering them in one account) would preclude him; because I think, as I said before, that it was merely an expression of his own private intention and opinion, which did not bind

the matter until it was communicated to the other side, which it never was. I do not think that his having demanded money from Rogers after he knew that Rogers was carrying on the new firm of Rogers and Beech will do, for the reasons given by Brett, L. J., that the notice of dissolution distinctly said, 'Whatever Rogers & Scarf owe, go to Rogers, and Rogers will pay it.' But then the evidence goes further. I am not sure that taking a cheque from Rogers & Beach as payment was enough to make an election, because I think that in acting on the authority given by Scarf to Rogers to pay the debts for him and Scarf, Rogers might pay money by the new firm's cheque, or otherwise, as he pleased. But then the plaintiff goes on and issues a writ against Rogers & Beach—*he sues Beach. I am unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers & Beach I can not imagine.* (Italics ours.)

At page 363, Lord Watson says:

"He had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfillment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that having chosen to proceed against one of these firms for recovery of his debt he could thereafter treat the other firm as his debtor."

At pages 364, 365, Lord Brannwell (whose decision in *Priestley* v. *Fernie*, 3 H. & C. 977, is much relied upon by or opponents) says:

"Now, that being the condition of things, when the truth was known to the plaintiff, I do not think that he was bound to elect at any particular time; but I am satisfied that when he did elect he was bound, and that after seeking to enforce his remedy, or indeed enforcing his rights, against one pair,

that is to say Rogers & Beech, he had not the right to maintain another action against Scarf separately. He could not maintain a second action against Scarf unless he joined Rogers with him, and the result would be that there would be two actions against Rogers for the same debt. It seems to me demonstrable, therefore, that if the plaintiff *elected to sue* any two he could not maintain an action against the third man either separately or jointly with one of the two whom he had originally sued.

"That being so, the plaintiff was not bound to elect, but if he did elect he was concluded by his election; and without occupying your lordships' time further I have only to add that it is to my mind absolutely plain that in this case his conduct was an election to sue and maintain his action against Rogers & Beech, and consequently that he has lost his right to maintain any action against Scarf." (Italics ours.)

Calder v. *Dobell*, 3 L. R. 6 C. P. 486; *Priestley* v. *Fernie*, 3 H. & C. 977, and *Curtis* v. *Williamson*, L. R. 10 Q. B. 57, all much relied upon by our adversaries, were cited to the court in that case. (See at pp. 346, 347.)

Speaking of *Scarf* v. *Jardine*, our learned opponents (Brief, pp. 59, 60) say:

"We stop to observe that here was an instance of suit begun and carried on until bankruptcy is reached, when it could be no longer prosecuted, and then the prosecution is transferred to the bankruptcy proceeding. Pending that proceeding a new suit is begun against Scarf. It was eminently unjust for Jardine to delay during all the time from February 25, 1878, the date he had notice of Scarf's retirement, and of the fact that Rogers had assumed the old debt, until after he had forced Rogers into bankruptcy by the suit and then to make claim upon Scarf. For he thereby deprived Scarf, who really stood in the attitude of a surety for Rogers, from all recourse upon him during the period when he could respond. There was clearly ground of estoppel."

But, we ask, how does it appear that Scarf would have had effectual recourse upon Rogers; that Rogers could have responded? Had Scarf, as surety, paid, and sued Rogers for reimbursement, the suit would have been for the same amount as Jardine sued for, and as Rogers was unable to respond for that sum at the suit of Jardine, but by it "was forced into bankruptcy," there is no reason to suppose that the same result would not have followed if Scarf had been the plaintiff instead of Jardine. True, Jardine had Scarf at his mercy; by his election he did for months deprive Scarf "of the right, in itself a valuable one," to *seek* payment from Rogers, of the chance of "promptly, and, it may be, effectively, exercising" that right. (See, *supra*, pp. 31–33.) But, precisely similarly, in the case at bar, Robb and Strong, by their concealment for six months of Kebler's alleged want of authority, by the allegations of their cross-petitions adopting his acts and their pursuit of the proceeds of the sale as money in the hands of his surviving partners had and received on their behalf and not accounted for to them, deprived us of the like right against Kebler's estate. We are ready to admit that "there was clearly ground of estoppel."

Our learned adversaries (Brief, p. 35) say that "in all the cases where the pendency of a suit not prosecuted to judgment has been held to constitute a ratification, there has been either an attachment, a trial by jury, or a replevin or some other step taken whereby the plaintiff had acquired some advantage."

But, as we have seen in *Merrill* v. *Rokes*, 54 F. R. 450, there was no attachment, and no suit of any kind, yet the mere demand of the principal made on the agent for the proceeds of the unauthorized sale was held to be a ratification. So, in *Ryan* v. *Doyle*, 31 Ia. 53, where payment of a fee to the attorney was held to ratify his unauthorized appearance and validate the judgment. So, in *Jones* v. *Atkinson*, 68 Ala. 167, where the principal's offer to trade a mare in his agent's

possession was held a ratification of the agent's unauthorized acquisition of her. So, in *Woodward* v. *Suydam*, where it appears the mere drawing of a draft on the agent for the proceeds of his unauthorized sale was held a ratification. We are unable to see how the mistrial, in *Thompson* v. *Howard*, 31 Mich. 309, or the non-suit for failure to prosecute, in *Littlefield* ads. *Brown*, 1 Wend. 398, was something "whereby the plaintiff had acquired some advantage."

As to the weight to be given to the circumstance that an attachment had issued in the suit, by which alone our opponents seek to distinguish many of the cases cited by us, in *Anchor Milling Co.* v. *Walsh*, 20 Mo. App. 107, 110, a case cited by them, it was said: "It seems, however, to be supposed that there is something peculiar in an attachment suit which proceeds upon an affidavit and a seizure in the first instance of the defendant's property, which takes it out of the ordinary rule that the plaintiff may abandon one action without estopping himself from pursuing any other remedy which he may have against the debtor in respect of the subject-matter of such action. We know of no foundation for such a distinction."

In the cases cited by us where an attachment had issued (except only *Butler* v. *Hildreth*, 5 Met. 49), the attachment is not even referred to in the opinions as a factor influencing the decision. Generally, it is not even mentioned; sometimes, as in *Conrow* v. *Little*, 115 N. Y. 387, it is mentioned, but only because the affidavit upon which the attachment was issued proved that plaintiff made his election with knowledge of the facts. Moreover, in most of the cases, it does not appear that plaintiff succeeded in levying upon any thing. Chief-Justice Shaw speaks of an attachment as "an act deeply affecting the rights" of the other party. How deeply the act of Robb and Strong affected our rights, depriving us of the right, itself a valuable one, of seeking restoration and payment from the estate of Kebler, the per-

son committing the alleged wrongs, we have shown. (*Suprd*, pp. 31–33.) And as against Roelker, Robb and Strong's cross-petitions had all the effect of an attachment of his mortgage claim. Seeking subrogation to his mortgage, their cross-petitions constituted a *lis pendens*, giving notice to the world that they claimed the benefit of that mortgage, tieing it up in his hands, making it impossible for him to dispose of it.

We come now to comment briefly upon some of the cases relied upon by the other side.

In *Morris* v. *Robinson*, 3 B. & C. 196, the various actions of trover were held to be not inconsistent remedies, but properly suable concurrently. Bayley, J., said: "If concurrent actions had been brought, that against the owners could not have barred the other; why, then, should it have that effect because they have been brought at different times?"

In that case, also, the owners of the goods wrongfully sold had sent a power of attorney to claim the proceeds from the registrar of the court which had without jurisdiction sold them. Before such demand made, that court had remitted the proceeds to the court in England. Plaintiffs did not and could not sue either the judge or the registrar of the court. We find in the report no warrant for the statement of our learned opponents (Brief, p. 36) that this application for the proceeds "was pending at the time of the trial of the suit in trover." Indeed, we do not see how it could have been, for when application was made under the power of attorney for the proceeds, "the same had then been remitted to England." The case only decides that application for payment made to a court for the proceeds of an unauthorized sale ordered by the court without jurisdiction, which proceeds are not in the possession, control, or authority of the court, is not a ratification of the sale.

In *Morgan* v. *Couchman*, 14 C. B. 100, one Golden acted as factor for both Morgan and Couchman. Being indebted to

Couchman he sold some of Morgan's goods to the latter, in an amount equal to his debt. Golden became bankrupt, and in that proceeding Morgan filed an affidavit claiming a debt of £70, 5s. 8d, "for goods belonging to this deponent sold and delivered by William Golden as factor or agent of this deponent, to Stephen Couchman (the defendant) and for which goods the said William Golden received payment by means of goods sold and delivered by the said Stephen Couchman to the said William Golden, and which goods were used by the said William Golden in the trade of a cheese monger." This was a suit for the goods of plaintiff sold by Golden as his agent to Couchman. The pleas were payment, and a claim of set-off against Golden alleging that Couchman did not know Golden was merely an agent of Morgan. This latter claim was negatived by the jury who found that the goods were not sold by Golden in his own name, and without notice to the defendant that the plaintiff was interested therein as alleged in the plea. The question of payment was not submitted to the jury, and they found for plaintiff for the amount claimed. It will be observed that ratification was not pleaded. The defendant claimed that he had proved his plea of *payment;* that Morgan having said in his affidavit that "Golden had received payment" for the goods sold to Couchman was estopped to say that they were not paid for.

Maule J. (p. 105) said:

"I am of opinion that this rule should be discharged. The question is, whether there was evidence that the money which the plaintiff seeks to recover was paid. The first piece of evidence relied on to show payment, was, the transaction which took place between Golden and Couchman. It appears that Golden had sold goods for the plaintiff, and also for the defendant; whatever arrangement, however, might be made between Golden and Couchman as to setting off the price of goods sold by the former to the latter against the consignments by the latter to the former, it can not, as between these

parties, amount to payment. Then, there is the affidavit which the defendant relies on as a kind of estoppel, in which the plaintiff speaks of this transaction in a proceeding against Golden. He does not, however, in that affidavit, state absolutely that the money was paid by the defendant to Golden for him. He states what he chooses to consider as payment: he says that Golden is indebted to him for goods belonging to him sold and delivered by Golden, as his factor or agent, to the defendant, and for which goods Golden received payment by means of goods sold and delivered by the defendant to Golden, and which goods were used by Golden in the trade of a cheese monger. That transaction does not amount to any thing like a payment of the debt due to the plaintiff from the defendant: and the circumstance of the plaintiff being anxious so to treat it, does not make it the more so than if he had said nothing about it. It is not at all in the nature of payment. If the facts detailed in the affidavit do not amount to payment, the circumstance of the plaintiff's calling it a payment will not make it so. The facts being all detailed, the conclusion that it amounted to payment is a mere matter of law which the plaintiff chose to infer. I think the affidavit does not show any such facts as amount to payment; nor do I think that any of the other facts which were given in evidence, as to the transactions between Golden and Couchman, at all operated as payment. It does not appear that there was any agreement that any thing which took place between Golden and the defendant should enure and operate as payment. That being so, I think the facts do not afford any inference from which the jury could legitimately find the issue on the plea of payment for the defendant."

Curtis v. *Williamson*, L. R. 10, Q. B. 57; *Priestly* v. *Fernie*, 3 H. & C. 977; *Calder* v. *Dobell*, L. R. 6, C. P. 486, and *Mason* v. *Cockroft*, 3 Duer. 366, are all cases in which the plaintiff had made a contract with the agent of an undisclosed princi-

pal. We may concede that they establish the doctrine that after the discovery of the principal, no legal proceedings short of judgment against either agent or principal, would preclude the plaintiff from abandoning his suit against the one, and bringing a new suit against the other. "Principal and agent were equally liable on the contract, and the vendor had a clear option as to which of them he would hold responsible:" *Curtis* v. *Williamson*, L. R. 10, Q. B. at p. 59. The agent is liable on the contract, because he contracted in his own name. The principal is liable on the contract, because it is *his* contract though made by the hand of another. In the absence of a change in the account between principal and agent, after discovery of the principal, or of some other act giving rise to an estoppel, plaintiff may sue either of the persons *party to that contract.* He may sue each in a separate suit, and one suit could not be pleaded in abatement of the other. His rights are concurrent, not inconsistent. *Until that contract, upon which each is liable, is merged in a judgment, it is available as a cause of action against either.* That is what Baron Bramwell meant when, in *Priestly* v. *Fernie*, he said, that the very expression that "where a contract is so made, the contractee has an election to sue the agent or principal supposes he can sue only one of them, that is to say, sue to judgment. For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other."

Peters v. *Ballistier*, 3 Pick. 495, was an action of trover for a cargo of molasses, which had been sold by the master of a ship, to defendants, partly for money and partly in cancellation of a debt due by his principals to defendant. He had authority to sell for money, but not in payment of his principals' debts. The money was expended for their benefit, but without their knowledge. They sued defendants in *assumpsit* for the balance of the purchase price of the molasses, but later abandoned the suit in *assumpsit*, and then sued in trover. It was held that the first suit was not a ratification, but

that on returning the amount of the money payment, their action in trover would lie. The case was decided on the ground that plaintiffs had not ratified by the action of *assumpsit*, because they never had a cause of action in *assumpsit*. Any attempt to ratify their agent's act, would necessarily ratify it in its entirety. Ratification of the sale meant necessarily ratification of all its terms, including the mode of payment. If that was ratified *assumpsit* for the balance could not lie. *Assumpsit* could not mean ratification, because ratification precluded the possibility of *assumpsit*. The case is clearly explained by C. J. Shaw, in *Butler* v. *Hildreth*, 5 Met. at p. 52. The distinguished chief-justice said: "Of a similar character is the case of *Peters* v. *Ballistier*, 3 Pick. 495, which at first view seems like the present. The plaintiffs first brought an action of *assumpsit*, which they discontinued, and afterwards brought trover, which they maintained. But the dicision proceeded on the ground that the plaintiffs had, in the first instance, misconceived their remedy, and could not maintain an action of *assumpsit*; that they had no election to make, and could only recover against the defendants in an action of trover, relying on their legal title to the property, and a conversion by the defendants." It is submitted that it is an entire mistake to say, as our learned adversaries do (Brief, p. 42), that "the misconception involved in bringing the action in the form of *assumpsit* consisted in the fact that it would have entitled the defendant to a set-off, which they could not take advantage of in trover, hence the discontinuance of the first and the institution of the second."

Valpy v. *Saunders*, 5 C. B. 886, was trover by the assignee of a bankrupt for goods purchased by defendant with notice after commission of the act of bankruptcy. Before bringing this suit, the assignee had sent defendant a bill for the goods, demanding the purchase price which defendants refused to pay. This was held no bar to the action in trover. Defendants were creditors of the bankrupt and

wanted the benefit of a set-off. But (see p. 891) "it was proved that before the delivery of the goods, the shopman who sold them informed the defendants that the goods must be paid for to the estate of the bankrupt." Demand of payment under such a contract could not be a waiver of the right to bring trover upon defendants' repudiation of the terms of sale.

In *Anchor Milling Co.* v. *Walsh*, 20 Mo. App. 107, a mortgagee of chattels brought suit on his debt and attached the mortgaged property. Afterward he dismissed that suit and replevined the mortgaged property for condition broken. It was held that bringing the first suit and dismissing it was no bar to the second. We perceive no reason why it should be.

The case of *Johnson-Brinkham Co.* v. *Central Bank*, 22 S. W. Rep. 813, seems to stand alone among the authorities. It is opposed to all of them; the opinion in *Heller* v. *Elliott*, 45 N. J. L. 564 (*supra*, pp. 38, 39), is particularly applicable to the facts.

Bunch v. *Graves*, 111 Ind. 351, was decided on the ground (see at p. 352) that "a party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one, which is not inconsistent with his true and effectual remedy which he should have pursued in the first instance."

Smith v. *Bricker*, 53 N. W. Rep. 250, simply holds that a petition in an action for damages for false representations inducing an exchange of lands, might by amendment be changed to a petition for rescission.

Huffman v. *Hughley*, 11 Lea, 549, was decided upon the ground that "the commencement of an action by the injured party against one of a series of tort feasors, upon the implied promise arising from the conversion of personalty, will not be a waiver of his rights against the other tort feasors."

Wells-Fargo Co. v. *Robinson*, 13 Cal. 134, holds that an

action establishing a claim against the estate of a deceased embezzler, does not preclude the plaintiff from pursuing by bill in equity and fastening a trust upon the specific funds embezzled. No reason is perceived why it should.

Dean v. *Yates*, 22 Ohio St. 388, was a case in which there was not a sale voidable for fraud, but a case of possession without title at all (syllabus 2, p. 389, p. 397). There could, therefore, be no question of electing to affirm a voidable sale. There was nothing to affirm. Hence, attaching part of the goods in the hands of the wrongful possessor for fraud, did not preclude replevin against another possessor without title of the remainder.

In *Becker* v. *Walworth*, 45 Ohio St. 169, the remedies between which it was claimed an election had been made, were held to be not inconsistent. The court, at page 174, said:

"She had the right, in such event, to look to the estate, or to the executor personally, and these remedies were not inconsistent. There would be no taking of one thing and rejecting another. The former remedy was primary, and the latter, in a sense, cumulative. The executor stood in two relations, but that did not make the plaintiff's claim inconsistent."

Ex parte Adamson, 8 Ch. D. 807, only decides that a creditor who having the right to prove either against the joint estate of a firm, or the separate estate of the partners, but not knowing that he has the latter right proves against the joint estate, may withdraw that proof and be allowed to prove against the separate estate of the partners.

All of the cases cited by our adversaries, except *Morris* v. *Robinson*, 3 B. & C. 196, and *Peters* v. *Ballistier*, 3 Pick. 495, are cases not of ratification, but of election. True, we, too, in addition to cases of ratification, have cited numerous cases of election to show that even the law of election is against them. But the question in the case at bar is one not of election, but of ratification.

"The term 'ratified,' when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent." *Ellison* v. *The Jackson Water Co.*, 12 Cal. 542.

One for whom an unauthorized agent has assumed to act may ratify the act; but it is a misuse of language to say that he has an *election* to ratify the act of his agent. It might as well be said if an offer is made and accepted, that the acceptor has *elected* to make a contract; that if a man eats three meals a day, he has *elected* not to die of starvation; that if a man continues to live, he has *elected* not to commit suicide; that if a man marries only one wife, he has *elected* not to commit bigamy. This would make every sane act connote an *election* not to do all other possible acts.

We may assume that, in every case of election, the person having the right of election may, in the absence of a change of position of others, raising an estoppel, change his election as often as he pleases. This, because election, generally, if not always, operates only prospectively; but ratification always operates retrospectively. Election concerns the choice between inconsistent rights or remedies, the affirming or repudiating voidable acts; ratification has to do with the adoption of acts until then void. The right of election may be conceded to be ambulatory, so as to produce no results until some one has acted upon the faith of an election made; ratification is not based upon estoppel, but is of itself in its effect instant and final.

That ratification simply operates by supplying something previously wanting, thereby validating what for such want had been until then void, is shown by the maxim, "*omnis ratihabitio retrotrahitur et mandato priori aequiparatur:*"

a maxim which has been part of our law since a time long anterior to that of Coke. See Coke Littleton, 207*a*.

In *Bronson's Ex'r* v. *Chappell*, 12 Wall. 681, 688, this court said:

"Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner."

In *Cook* v. *Tullis*, 18 Wall. 332, 338, this court said:

"The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification."

In *Wilson* v. *Tumman*, 6 M. Gr. 236, 242–3, Tindal, C. J., said, "That an act done *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his *previous* authority."

The retroactive efficacy of ratification is strikingly illustrated by the case of *Bolton Partners* v. *Lambert*, 41 Ch. D. 295.

There "an offer of purchase was made by the defendant to S., who was the agent of the plaintiffs, but was not authorized to make any contract for sale. The offer was accepted by S. on behalf of the plaintiffs. The defendant withdrew

his offer, and after the withdrawal the plaintiffs ratified the acceptance of the offer by S. In an action by the plaintiffs for specific performance of the contract:

"Held (affirming the decision of Kekewich, J.), that the ratification by the plaintiffs related back to the acceptance by S., and therefore the withdrawal by the defendant was inoperative, and the plaintiffs were entitled to specific performance."

Such being the operation of ratification, it follows, necessarily that there is no *locus poenitentiae;* if an act be once ratified, there is no room for reconsideration or revocation.

In *Smith* v. *Colgan*, 2 T. R. 189, note, Buller, J., said: "Now, if with a knowledge of all the circumstances, he adopted the defendant's acts for a *moment*, he ought to be bound by them."

In *Rolling Stock Co.* v. *Railroad*, 34 Ohio St. 450, 463, the court said: "A ratification once made becomes as irrevocable, obligatory, and binding as if the act of the agent were previously authorized."

Evans on Principal and Agent, p. 76, says: "There are two rules respecting ratification which may be noticed here. The first is, that if a principal ratifies and adopts the agent's acts, even for a moment, he is bound by them. In other words, after ratification, there is no *locus poenitentiae*."

Robb and Strong, having ratified Kebler's acts as done "on their behalf," can not now repudiate them. That the judgment of the Circuit Court so holding was right, is respectfully submitted.

GUSTAVUS H. WALD,
For William Stix.

CHARLES B. WILBY,
Of Counsel.

Robert Clarke & Co., Printers, Cincinnati.] [March, 1894.

Supreme Court of the United States.

OCTOBER TERM, 1893.

James Hampden Robb and Charles E. Strong, Trustees,

Appellants,

No. 252.] *vs.*

August Vos and William Stix,

Appellees.

BRIEF FOR APPELLANTS IN REPLY.

Separate briefs are filed by the appellees; but, with the exception of the question of jurisdiction raised by appellee, Stix, the brief filed on behalf of appellee, August Vos, discusses all the questions presented in the brief of appellee, Stix. Except upon the question of jurisdiction, our reply will therefore be addressed to the brief filed on behalf of August Vos.

I.

We claim that there is jurisdiction in this court to entertain the appeal as to William Stix. Counsel for William Stix says in his brief:

"The object of the suit is to obtain a declaration that, by his purchase at judicial sale of three parcels of ground, William Stix obtained no title against appellants."

This statement is not sufficiently accurate for the present purposes. It does not go far enough. It does not state the entire object of this action. The object of this action is twofold: It is to recover the interest of the beneficiaries of the life estate as well as the interest of the beneficiaries of the reversion in fee. There are two sets of beneficiaries interested in this case, namely, Ellen W. Robb and Mary Robb, beneficiaries of the life estate, and Mary R. Miltenberger, Charlotte M. Pancoast, James H. Robb, and Madam San Roman, the owners of the estate in reversion. (See plaintiffs' Exhibit A, to deposition of J. Hampden Robb, Additional Record, p. 1.) This shows the character of the trust. The object of this suit is not only to obtain a declaration that Stix has no title to the reversion in fee, but, as already stated, it goes further, and has for its object a declaration that Stix *has* title to the leasehold estate as assignee, and as such is liable to the appellants, jointly with August Vos, for all rent reserved under the lease falling due since February 5, 1887, and accrued down to the time of the decree taken in this case, November 26, 1889.

The object of this suit may be more distinctly formulated as follows:

1. That complainants be restored to their title as trustees of the reversion in fee of the land bought by defendants.

2. That the lease be held and declared to be in full force and effect and binding on defendants as assignees of Loth.

The claim of liability against William Stix on the covenants of the lease is joint. The bill avers (Record, p. 10) that rent at the rate of $600 per annum was payable from February 5, 1886, and that the amount of rent due and unpaid, with interest, is a lien upon the leasehold estate prior to any right therein acquired by the defendants below. (See Record, bot. p. 10.) The prayer of the bill is that the amount of rent accrued under the terms of the lease and in arrears and unpaid, with interest thereon, be ascertained by order of the court; that complainants be declared and

adjudged to have a lien therefor upon the leasehold estate by virtue of the provisions of said lease; that said leasehold be sold to satisfy the lien; that the proceeds of said sale be applied first to the payment of the rent accrued prior to the 24th of May, 1887; and that the defendants be decreed to pay all the rent that has accrued under said lease since the 24th of May, 1887, or to pay such part thereof remaining unsatisfied, after the application of the proceeds of said sale in the manner asked for. (See Record, p. 11, at bottom.) In addition to this, the bill prays that Vos and Stix be required to perform the covenants of the lease as to insurance in a sum of not less than $5,000. The amount of rent, with value of land bought by Stix, may be stated thus:

The total rent falling due from February 6, 1886, to the date of the entry of the decree, November 26, 1889, say three years and nine months, at $600 per annum.....	$2,250 00
Interest on above for an average of one year, ten months and fifteen days, at 6 per cent.....	253 12
The value of the fee of the land purchased by Stix (Record, pp. 100 and 101).....	3,130 32
Total.	$5,533 44

All of the above was directly involved in this case.

In *Wilson* v. *Daniel*, 3 Dallas, 401, the dissenting opinion of Iredell, Justice, shows that the amount in dispute is determined by the matter in dispute on the writ of error. This rule has been followed in the practice of this court, contrary to the views expressed in the majority opinion in that case. The rule has been recognized in subsequent opinions. In *Gordon* v. *Ogden*, 3 Peters, 33, Chief-Justice Marshall said:

"If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be

still recovered, should the judgment for a smaller sum be reversed." (See p. 34.)

This is equally true if the plaintiff has recovered nothing. So where the plaintiff fails altogether, and appeals or takes a writ of error, the amount in dispute, for the purposes of determining the jurisdiction of this court, is the value of the thing sued for.

In *Knapp* v. *Bank*, 2 How. 73, Mr. Justice Story said:

"Where the plaintiff sued for an amount exceeding $2,000, and the *ad damnum* exceeds $2,000, if by reason of any erroneous ruling of the court below the plaintiff recovers nothing, or less than $2,000, there, the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than $2,000, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given; and consequently he is not entitled to any writ of error."

See also *Ryan* v. *Bindley*, 1 Wall. 66.

In *Hilton* v. *Dickinson*, 103 U. S. 165, the chief-justice, reviewing the former decisions on the point, said:

"Under this rule we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much or more than our jurisdiction requires and recovers nothing." (See p. 175.)

In *Stinson* v. *Dousman*, 20 How. 461, suit had been brought in the territorial court of Minnesota by Dousman to recover of Stinson $481 as rent for a parcel of land in St. Paul. Dousman had made a contract with Stinson by which he agreed to sell the land to Stinson for $8,000, to be paid in three installments with ten per cent interest. The contract contained a provision whereby, in case of failure on the part of vendee to perform any of its stipulations, the vendor might annul it and recover by *distress* or otherwise from the

vendee all interest accrued upon the contract as rent, and might take possession of the land. Upon the vendee failing to pay the first installment, the vendor annulled the contract, demanded possession of the land, and brought an action for the rent, $481. The defendant filed an answer denying his liability to pay the money demanded, but also prayed a "*decree affirmative of the continuing validity of the contract of sale.*" He set up various reasons for his failure to make punctual payment and averred present willingness and ability to pay and offered to pay into court all sums which the contract obligated him to pay. In a word, he was struggling to be saved the loss of his contract, which he regarded valuable. The court below gave judgment for the rent in favor of the plaintiff, Dousman, and denied the affirmative relief prayed for by defendant below. The defendant thereby not only lost the land, but was compelled to pay the rent. The defendant took a writ of error from the judgment. In this court it was objected that there was no jurisdiction because the matter in dispute was claimed to be not of the value of $1,000. The court said:

"The objection might be well founded if this was to be regarded merely as an action at common law. But the equitable as well as the legal considerations involved in the cause ought to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of the rent claimed, but *the title of the respective parties to the land under the contract.* The contract shows that the matter in dispute was valued at $8,000. We think this court has jurisdiction." (Italics ours.)

In the present case the object of our suit is not to recover the land, but our title as owners of the reversion in fee, and our right to the rents payable under the lease, and to have a decree for the same. The value of the reversion of this fee is $10,000. We are seeking to have that title re-

stored, and the fact that we ask to have deeds, that have been made to William Stix for a portion of the land, canceled, does not determine the amount in dispute. We insist that the amount in dispute is the entire sum of $10,000 and the rents accrued and the value of the insurance.

This case differs from *Center* v. *Farmers' Loan and Trust Co.*, 145 U. S. 224. There the suit was for two specific installments of rent for $1,850 each, with interest. The bill prayed that the city be decreed to have contracted with the Trust Company to pay directly to it so much of the rental as might be necessary to meet the interest on the bonds, and to pay the two installments then due. This amounted to no more than a prayer that the Trust Company be declared to have a right of suit on the contract. The value of that right, however, was measured in its operation in that case by the two installments mentioned. The court said:

"This is all that could be recovered in this suit, if the contract were valid and binding as found. If the Circuit Court had arrived at the contrary conclusion on that point, this was all that in this suit complainant could have lost; and as in the latter contingency complainant could not have brought the case here, so defendant can not, because the decree, which allowed all that was claimed, is for less than the jurisdictional amount."

In the present case, the relief asked brings the rent down to the day of taking the decree. Upon the dismissal of our bill we lost not only our title to the land, but the rents at the rate of $600 per annum since the payment of the last rent. That loss occurred by and at the time of the entering of the decree, November 26, 1889. The appeal bond was made only to Vos, but the appeal having been taken in open court, and being a general appeal, we may now by leave of court file an appeal bond in favor of both appellees, which bond we now present.

Anson v. *The Blue Ridge R. R. Co.*, 23 How. 1.

Davis v. *Peugh*, 110 U. S. 228.

II.

Counsel detail at the beginning of the brief for August Vos certain facts concerning the filing of a petition in the Superior Court of Cincinnati by Robb and Strong, trustees, wherein they say the transaction was treated as a mortgage securing a loan of money, $10,000, which the trustees sought to foreclose, and that said suit was subsequently dismissed and the present action begun in lieu thereof in the Circuit Court of the United States; also that the cross-petition filed by Vos, no service being obtained in that proceeding on Stix, was removed by Robb and Strong, who had thus become defendants, to the United States Court, and that it was afterward consolidated with the present case. All this being true, we are led to ask, What of it? The fact that we at first thought this transaction could in equity be treated as a mortgage and be foreclosed as such does not prevent us from treating it now in its present true character. To treat the transaction as a mortgage loan redeemable at the will of mortgagees, is to overlook the important feature that the loan, if loan it were, was not redeemable during the lifetime of Ellen W. Robb and Mary Robb, the *cestuis que vivent*, and the owners in equity of the life estate, or rather of the income of that estate. The estates created by the conveyances in question in this case having been settled to certain uses, could not be disturbed by the trustees without the consent of the beneficiaries, which consent was never had. Therefore, even if the transaction was in equity a loan, disregarding forms, it was a loan *irredeemable* during the life of Ellen W. Robb and Mary Robb. The court will observe that the obligation of Loth, the life lessee, to purchase the fee, did not arise until after the death of Ellen W. Robb and Mary Robb. (Rec., marg. p. 100, Ex. C.) During their lives the settlement of these estates was not a matter of form, but of sub-

stance, and could not be broken up by any voluntary act of the trustees alone. To say the least, the transaction was one out of the ordinary course, and, happily for our profession, such frauds as Kebler perpetrated are rare. It may not, therefore, be surprising that counsel were at first somewhat at a loss to determine the correct mode in which to proceed. As soon as counsel realized that the transaction could not, during the lifetime of Ellen W. Robb and Mary Robb, be treated as a loan collectible by foreclosure, all further effort in that direction was abandoned by a dismissal of the petition filed in the Superior Court of Cincinnati.

III.

Under the head, "Had the Court Jurisdiction?" counsel claim that to give a court of equity jurisdiction it is necessary that the fraud complained of must be a fraud practiced by persons against whom the bill is filed. In other words, as far as this case is concerned, their claim is that to entitle us to relief we must show fraud on the part of Vos and Stix, or must show their knowledge of fraud on the part of Kebler. In plain language, they claim there can be no relief against what they call innocent purchasers. We have argued in our original brief (see pp. 6 to 12) and have there quoted authorities to show that if Vos and Stix be innocent purchasers, it can make no difference. Counsel say that in the case of *Johnson* v. *Waters*, 111 U. S. 64, cited by us, the fraud was committed by the purchasers at the judicial sale, they being the parties who set on foot a sham sale in order by that means to acquire title to the land. We did not cite that case except to show that the United States courts will relieve against a judgment obtained in a state court by fraud. Counsel also claim that the case of *Shelton* v. *Tiffin*, 6 How. 163, upon which we rely, was one where the purchaser

had been a participant in the fraud. But they are mistaken as to that. The relief given in that case was based solely upon the fact that the court had no jurisdiction in the original suit to render the judgment because the attorney who appeared for the defendant was without authority, although his appearance was a mere inadvertence, and not a fraud, as in the case of Kebler. It was under a judgment thus obtained that the purchaser bought the notes in question at a sale of defendant's property made by the marshal. This court there drew the distinction between a title acquired by a sale under a *fraudulent* judgment and one acquired at a sale made in pursuance of a *void* judgment, as follows:

"An appearance by counsel under such circumstances, to the prejudice of the party, subjects the counsel to damages. But this would not sufficiently protect the rights of the defendant. He is not bound by the proceeding, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property.

"An execution sale under a fraudulent judgment is valid if the purchaser had no knowledge of the fraud. But in this case L. P. Perry was not amenable to the jurisdiction of the court and did no act to authorize the judgment. He can not, therefore, be affected by it *or by any proceeding under it.*" (Italics ours.)

Anderson, the purchaser of the promissory notes sold at marshal's sale in that case, had been guilty, it is true, of fraud in other respects, but not in respect to the purchase. There was no pretense that such was the case. The decision can not be accounted for, therefore, nor its weight impaired, by the sweeping statement of counsel that the case "of *Shelton* v. *Tiffin*, 6 Howard, 163, much relied on by appellants (Brief, p. 7), was covered all over with the fraud of purchaser, Anderson, and the court animadverted upon it in se-

vere terms." This statement is repeated in another form in counsel's brief, at p. 25, where they again struggle to relieve themselves of the force of the decision in *Shelton* v. *Tiffin* as follows: "We have heretofore pointed out the important fact in the case last named that the sale complained of was steeped in fraud on the part of the purchaser." Anderson, the purchaser, had had nothing whatever to do with the institution, prosecution, or the judgment rendered, or with any proceeding in the case of *Moseley and Bouldin* v. *The Perrys*, which was the case wherein the notes Anderson had previously given to defendant, Lilburn P. Perry, were bought by Anderson. He was an innocent purchaser of said notes, if there can be such a thing where the judgment under cover of which the purchase is made is void. He paid $5,000 to the marshal and received a bill of sale. The transactions which the court animadverted upon with severity were transactions which occurred subsequent to this purchase, and consisted in an attempt on the part of Anderson to obtain an adjudication in the state court sustaining the judgment, *after the bill in the United States court had been filed, to set aside the sale on the ground that the attorney, Crawford, had no authority to enter the appearance of Lilburn P. Perry*, and also in his combining with one Robert Anderson in a subsequent suit to foreclose a second mortgage on the same property, and in his subsequent joint purchase with Robert Anderson of that property at such foreclosure sale. But, as we have stated, these transactions were entirely distinct and separate from the transaction of the purchase of the notes under the void judgment and had no connection whatever therewith. Whatever fraud there was in the case did not "steep" the purchase of the notes. (See the case, pp. 166–7–8.)

It is impossible to conceive that a void thing can constitute the foundation for any claim or defense. The point can not be put in stronger terms than was done by this court in

Hardeman v. *Harris*, 14 How. 339, where this language is used:

"In reference to the first inquiry, it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfill. The court entering such judgment by default could have no jurisdiction over the person as to render such personal judgment, unless, by summons or other process, the person was legally before it. A court may be authorized to exert its powers in reference either to persons or things—may have jurisdiction either *in personam*, or *in rem*, and the existence of that jurisdiction, as well as the modes of its exercise, may vary materially in reference to the subject-matter to which it attaches. Nay, they may be wholly inconsistent; or, at any rate, so much so, as not to be blended or confounded. This distinction has been recognized in a variety of decisions, in which it has been settled that a judgment depending upon proceedings *in personam* can have no force as to one on whom there has been no service of process, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That with respect to such a person, such a judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community."

Counsel then question whether to obtain relief against a judgment rendered upon an appearance entered by an attorney without authority knowingly and therefore fraudulently, it is proper to go into equity. Relief against judgments obtained fraudulently has always been a recognized head of equity jurisprudence, and we are unable to see that a different rule should apply in regard to a judgment rendered against a

party by the unauthorized and fraudulent appearance for a party to a case by an attorney.

In *Metcalf* v. *Williams*, 104 U. S. 93, which was a bill in equity filed to set aside a judgment obtained by default after the term had passed, this court granted the relief, saying, among other things:

"Had not the term passed by, the district judge would undoubtedly have set aside the judgment, and reinstated the cause on the docket for trial. If, as he supposed, the passage of the term deprived him of power to do this, it became a proper case for equitable interference by bill. When a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief. Perhaps, in view of the equitable control over their own judgments which courts of law have assumed in modern times, the judgment might have been set aside, on motion, for the cause set forth in the bill; but if this were true, the remedy in equity would still be open; and the fact that the court declined to exercise the power upon motion, rendered the resort to a bill necessary and proper. Formerly bills in equity were constantly filed to obtain new trials in actions at law, a practice which still obtains in Kentucky, and perhaps in some other jurisdictions; but the firmly settled practice by which courts of law entertain motions for new trial, and the dislike of one court unnecessarily to interfere with proceedings in another, has caused an almost total disuse of that jurisdiction. Courts of equity, however, still entertain bills to set aside judgments obtained by fraud, accident, or mistake."

In *Harshey* v. *Blackmarr*, 20 Iowa, 161, the court points out that to obtain relief against a judgment rendered upon an unauthorized appearance, it is necessary to apply for relief either by motion or a bill in equity; that as to domestic judgments it can not be done otherwise, because in a direct action on such a judgment the party could not plead his ig-

norance of the suit and the attorney's want of authority to appear for him. After showing that the contrary is true in regard to foreign judgments, the learned chief-justice suggests a plausible reason for the distinction, in that respect, between domestic and foreign judgments, to be that in regard to a foreign judgment it would be impossible, or at least unreasonable, to require the defendant to go to the court of the state which rendered it and attack it directly by a bill or motion. But however that may be, the learned judge delivering the opinion in that case said:

"Certain it is, however, as the authorities hereinafter cited will show, that the party is entitled to relief when an unjust judgment, though a domestic one, has been rendered against him by fraud or collusion, or by the appearance of an unauthorized attorney, if the party seeks the relief by bill or motion promptly, and has been guilty of no laches." (See pp. 172 and 173.)

In Freeman on Judgments, sec. 499, it is said:

"Now it seems to be a rule applicable to a greater part of the United States, that a judgment resting upon the unauthorized appearance of an attorney, may be annulled in equity, *irrespective* of the question whether *the attorney is responsible or irresponsible.*"

The author then quotes at length the admirable opinion of Chief-Justice Dillon, above referred to. See also Freeman on Judgments, sec. 500, and on the general subject of relief in equity against judgments, id., secs. 484a, 485 and 486.

IV.

Counsel next claim that appellants had a plain, adequate and complete remedy at law. We will not repeat the argument on this point made in the original brief, but only notice the authorities counsel cite as far as there seems to be occa-

sion. They cite the case of *Whitehead, Trustee*, v. *Shattuck*, 138 U. S. 146, and quote the opinion of Mr. Justice Field. That case has no application here. It was a bill in equity, filed by a party claiming title to certain land *in the possession of the defendants*, the bill alleging, however, that the possession of the defendants was fraudulent because it was held under and in respect to a patent of the United States and a deed from the Iowa Improvement Company, which patent was charged to be fraudulent because the land embraced therein was alleged to be not subject to entry, and the deed from the Iowa Improvement Company was charged to be fraudulent because that company did not own the land embraced in the deed. The most casual attention to the facts of the case shows that if the contention of the complainant made in the bill were true, there was no obstacle to the assertion of his rights in an action at law. The charge that the patent and the deed were fraudulent was simply an inappropriate epithet. Counsel ask if that case is not analogous to the present one, saying that "in each case the defendants who were in possession of the land owned the fee simple title?" The difference between the two cases is very marked. Upon our contention and our view of the present case the defendants are not in possession of this land under a fee simple title, but only under their title as life tenants by assignment from Loth per master commissioner in the case of Gugenheim against Loth in the Court of Common Pleas of Hamilton County, Ohio.

In order to maintain the position that their clients are in possession of the land in question by a fee simple title, and that we could assert our right thereto by an action at law, counsel next undertake to get rid of the life estate by several ingenious methods:

1. They claim that under the decretal sale the leasehold passed to Vos and Stix, and that there was consequently a merger in them of the life estate, and that they took posses-

sion of the land by fee simple title, *freed from the claims of all parties to the suit.* Whether there was a merger of the lesser estate in the greater is the very question in this case. We admit that Vos and Stix took the title freed from the claims of all parties to that case, *except Robb and Strong, trustees.*

At the decretal sale the leasehold estate of Loth was sold. This appears at p. 40 of the record from the order of sale. At marginal p. 75, the decree reads:

"All the foregoing leasehold premises from the number '2' near the end of the fifth page hereof, and marked 'a,' 'b,' 'c,' 'd,' being the same premises conveyed by Loth and wife to Robb and Strong, trustees, by deed dated February 5, 1885, recorded in Deed Book ——, p. ——, Hamilton county records, and by Robb and Strong, trustees, leased to said Loth by lease dated February 5, 1885, and recorded in Lease Book ——, page ——, Hamilton county records."

The reference in the order of sale to the fee-simple title is found at marginal p. 76 of the record, and is as follows:

"It is further ordered, and it is ordered with the consent of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, that the fee-simple title of the premises described in said mortgage to William Stix be sold, and said premises sold freed from the claims of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, and all other parties to this suit."

The sale of the fee-simple title was only conditional upon the consent of Robb and Strong, trustees, which consent, as we have abundantly shown, was never given, but the sale of the leasehold was absolute.

2. Counsel next claim that there never was any life estate in fact, even before the decretal sale, because they claim that the transaction was in reality a loan of $10,000 at six per cent interest secured in the form of a deed and lease; and they again refer to the petition filed in the Superior Court of Cincinnati by Robb and Strong to prove this. We

have already answered this sufficiently to make further notice unnecessary, except to add that we are unable to see how it would advance the argument our learned adversaries are now making to assume the transaction to be a mortgage. If it were a mortgage, we should certainly have the right to foreclose it by a bill in equity.

3. They next claim that viewing the transaction as a lease, its conditions had been broken, and that under the terms thereof we were entitled to re-entry, and by that means could obtain possession; and they refer to the fact that in the bill we allege that there was default on the part of the lessee in the non-payment of rent since February 5, 1886, and also default by the failure to keep the premises insured. Our adversaries misapprehend the nature of our claim. We are not suing to recover land nor the possession of land. We do not want it. We are suing to have titles to land restored in a way that would deprive us of any possession of the land, except through our tenants or their assignees. Moreover, re-entry or the right of re-entry is only another mode of collecting rent. Again, the right of re-entry is only an option given to a landlord which he may avail himself of or not. If he like, he may resort to the enforcement in equity of his lien to secure the rent in cases where a lien has been reserved, as in this case. The position taken by our adversaries perverts the option given to the landlord by virtue of his right to re-enter, and, by making it obligatory on the landlord, transfers the option to the tenant. Moreover, we could not have re-entered upon these premises as a landlord after our title had been apparently taken from us by the decretal sale in the Gugenheim case.

See Taylor on Landlord and Tenant, 8 ed., sec. 492, note 3; id., sec. 495.

Our adversaries next refer to the fact (see their brief, p. 21, at bot.) that Kebler filed an answer for Robb and Strong,

trustees, to the cross-petition of William Stix in the Gugenheim case, under which cross-petition the property was sold, and that he alleged in that answer that Loth had failed to pay the rent due February 1, 1886, and that Robb and Strong, trustees, were entitled to have the premises sold for the payment thereof, and asked for a sale of the fee simple of the premises and for repayment of the $10,000. They then refer to the fact that, with full knowledge of the filing of such answer by Kebler, the trustees, on May 12, 1888, two years afterward, filed the oft-mentioned petition in the Superior Court, setting up the transaction as a mortgage and praying for a sale of the premises. From this they deduce the curious argument that, had the trustees known of the pendency of the Gugenheim case, they would have authorized Kebler to file such an answer as the answer of July 24, 1886. This seems to us very far-fetched. We beg to say, however, that, strange as it may seem, we had not noticed this answer of July 24, 1886, until our attention was called to it by the brief of appellees in this case. If we had noticed the answer, we should sooner have made the following obvious comments: This answer filed by Kebler, July 24, 1886, is but additional evidence of his fraudulent scheme. It is absolutely contradictory of the first answer which he filed for Robb and Strong, and which he swore to, shown in the record at p. 30. By his sworn answer to the interrogatories attached to that pleading, he said that Robb and Strong had no contract whatever with Loth except that evidenced by the lease from Robb and Strong, and that Loth had no interest, legal or *equitable*, other than as lessee in the premises.

In July, 1886, however, Kebler doubtless realized that, if the lease should stand, there would be no interest of Loth's to be sold beyond a bare leasehold, and thus no proceeds to be stolen. He therefore changed his ground and asserted that the lease was really a mortgage. In his first answer (Record, p. 30), Kebler refused to join in the prayer of Gu-

genheim for the sale of the premises, while in the second answer (Record, p. 36), he joined in a like prayer of Stix, his client.

The case of *Killain et al., Trustees*, v. *Ebbinghaus, Trustee*, 110 U. S. 568, cited by our adversaries (p. 23 of their brief), has no application to this case. It was a suit by a trustee of church property, out of possession, against persons in possession claiming title, praying in effect the recovery of possession and for a determination as between two contending factions of the church, which was the beneficiary of the trust. The bill was claimed to be in the nature of an interpleader; but, as the court pointed out, was not of that character because the complainant was out of possession, and was attempting indirectly to assert title to the property, an interpleader being appropriate only where the party is in the nature of a stake-holder without claim of title or interest in the subject.

We think it unnecessary to comment upon the other cases cited by counsel under this head, as the difference between the case last cited and the case at bar exists as to the other cases cited. It is proper, however, that we should notice the criticism of counsel upon the case of *Harshey* v. *Blackmarr*, 20 Iowa, 161 (their brief, p. 25), which they properly say we freely draw upon for support of our contention. Counsel say that the unauthorized appearance in that case was through the fraud of the plaintiff in the original action. It was not through the fraud of the plaintiff, but through the fraud of the attorney of the plaintiff in the action, which is perhaps the same thing. But as the relief sought was not against the plaintiff in the original suit, but against the purchasers at the sale, we do not see what difference it makes that the fraud there was perpetrated by the attorney of the plaintiff and not by the attorney of the defendant. But if that argument has any force, we may say in the Gugenheim case the fraud was likewise perpetrated by the attorney for

the plaintiff because Kebler, who was the attorney for William Stix, had this property sold on the cross-petition of Stix, the virtual plaintiff.

Counsel further say that the case of *Harshey* v. *Blackmarr*, *supra*, was based upon the cases which arose between the immediate parties to the judgment or decree. But, even if that were so, we do not see what difference it would make. At least several of the cases cited, in the opinion of the learned judge, in *Harshey* v. *Blackmarr*, *supra*, were cases where defendant had been compelled to pay money twice because suit had been brought in the name of a plaintiff by an attorney unauthorized to do so; judgment obtained, the money paid by the defendant without knowledge of the fraud, who was compelled to pay it over again in a second suit.

The true ground upon which the relief was granted in *Harshey* v. *Blackmarr*, as well as in *Shelton* v. *Tiffin*, against purchasers at a judicial sale, was the fact that the judgments in both cases were void for want of jurisdiction.

Counsel further say that appellants could have brought a suit under the laws of Ohio in the Court of Common Pleas or in the Superior Court of Cincinnati. We fail to see what difference that would make. The courts of the United States have concurrent jurisdiction with the courts of the state; and the fact that we might have brought a suit in the state court does not prevent us from bringing suit in the United States Court.

Counsel next claim that, under sec. 5187 of the Revised Statutes of Ohio, an action for the recovery of real property may be brought by petition, wherein the plaintiff must aver that he has a legal estate and is entitled to the possession thereof. We do not see how Robb and Strong could have proceeded under this section of the statutes, inasmuch as they could not swear to a petition containing an averment that they were entitled to the possession of the premises in question. All pleadings of fact in Ohio must be sworn to.

(Sec. 5102, Rev. Stat. Ohio.) The claim of our adversaries that, under this section and succeeding sections of the statutes, the whole controversy as to the title and right of possession and the respective rights of all parties interested in this case could have been settled and enforced, is therefore far from correct.

Our adversaries claim that the court has adjudicated that Robb and Strong gave their consent to the decree in the Gugenheim case. This, in view of our claim that the court had no jurisdiction, is an assumption of that point. It seems, therefore, quite inappropriate that our adversaries have filled so much space with protestations of regard for the verity and sanctity of a judicial record. Let it be first shown that there is a record, then the sanctity follows without question. A court can not, however, make a record by mere use of pen, ink, and paper. This is well stated in *Starbuck* v. *Murray*, 5 Wendell, 158, where the court said:

"But it is strenuously contended that if other matter may be pleaded by the defendant" (the other matter was that defendant had not been served and had not appeared in person or by attorney, the suit being on a judgment), "he is estopped from asserting any thing against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it can not be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to shew that its proceedings and judgment are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he can not shew, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by

a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue (and the whole current of state court authority shows it to be a proper issue) is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction."

This language is quoted and approved by this court in *Harris* v. *Hardeman*, 14 How. 341.

Regarding the claim that Vos and Stix are *bona fide* purchasers for value without notice and therefore took an unimpeachable title, we are willing to admit that they had no actual notice of Kebler's want of authority. Whether they had or whether they had not such notice, is utterly immaterial as to this part of our case. The doctrine of purchaser for value without notice (except in the case of negotiable instruments) applies only where one having the legal title is sought to be affected in equity upon the ground that the holder of that title is in privity with the person originally subject to the equity. (Langdell's Summary of Equity Pleading, pp. 89, 90, 91.) If the jurisdiction of the court in the Gugenheim case be conceded, then there would arise the

further question as to the *bona fides* of Vos and Stix. We have discussed that feature in our original brief under the subject of ratification. (See p. 25, et seq.) To the authorities there cited, we now add 2 Perry on Trusts, sec. 874, and *Kerrison, Assignee*, v. *Stewart*, 93 U. S., at p. 160.

So the claim, industriously put forward by the counsel of Vos and Stix, that this court should be very astute to afford them relief because of their innocence and reliance upon the correctness of court proceedings, becomes less pathetic when we remember that Vos and Stix well knew that Robb and Strong were non-residents of Ohio and that they had not been served with summons; and knew also that the value of the decree of sale as a muniment of their title depended *solely* upon Kebler's authority and upon the truth of the statement therein made that Robb and Strong had consented to a sale of the fee simple of these premises. Of the truth of that important feature of the decree there was no evidence whatever required by them, except the sole statement of Vos that he has an impression that Kebler at the day of sale said he represented Robb and Strong. (Record, marginal p. 265.) Vos and Stix, therefore, knowingly assumed the risk of the existence of Kebler's authority to give such consent.

In *Bayley* v. *Buckland*, 1 Ex. Rep. 1, the court uses this language:

"On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he had not done so. The defendant there is wholly free from blame, and the plaintiff not so." (See star p. 7.)

The purchasers, Vos and Stix, in the present case stand in the shoes of the plaintiff in the case of which the court was speaking when it used the language above quoted. If they accept a substituted mode of getting defendant into

court, they must take the risk if that mode was not in fact pursued. They have departed from the law, and must abide the consequences.

At p. 37 of their brief counsel say that the cross-petition filed by Vos in the Superior Court of Cincinnati to the petition filed by Robb and Strong therein, May 12, 1888, was improperly removed to the United States Court; that the same should have been remanded to the state court, on their motion. It is sufficient to say of this that if the objection was ever valid, and it clearly was not, it now comes too late, Vos having taken in *this* case a decree quieting his title upon *that cross-petition*. (See Rec., top p. 175.)

V.

KEBLER'S WANT OF AUTHORITY NOT PROVEN?

Under this head our adversaries claim we have not proven Kebler's want of authority. They say that "long after judgment and the attorney's death" public policy requires a strong presumption in favor of the attorney's authority. Our suit was not begun long "after judgment," nor long after Kebler's death. Judgment was rendered (decree of confirmation) May 19, 1887. Kebler committed suicide November 23, 1887. We got the information as to the fate of our property the latter part of 1887, first as a rumor (Rec., p. 125), and began this suit May 31, 1888, after having made previous ineffectual demonstrations. In the meantime no change had taken place. No evidence had been lost. Time had moldered nothing. How can it then be argued that we should be prejudiced by Kebler's demise? We did not wait until he died, for it was only by and in consequence of his death and the manner of it that an investigation, which developed the facts, was set on foot. We are unable to see what foundation counsel can show for their claim that the

ordinary presumption of an attorney's authority (a presumption based upon his supposed good character as an officer of the court) ought to be enlarged in this case. Surely the fact that Kebler died with an indebtedness of $126,000, being in most part for forged notes he sold to others and for moneys received for investment, which he did not invest (see evidence of his Adm'r, Rec., marg. p. 254), does not favor a presumption of good character and of authority to enter appearance. Counsel also claim, in regard to Kebler's want of authority, that we have not fulfilled the equity requirement of two witnesses, or one witness with corroborating circumstances, to overcome a sworn answer. To succeed in their contention on this point, our opponents first endeavor to eliminate one of our witnesses, Mr. Strong, from the case, saying that he has had nothing to do with the trust except nominally to be a trustee. But as there was nothing else to be done except nominally to be a trustee, we do not recognize their right to ignore his evidence. During the life of Ellen W. Robb, the only duty of the trustees was to collect the rent and pay the same over to Mrs. Robb. The trustees living in New York, the rent being payable in Cincinnati, the recipient of the income living there also, it is quite natural that the collection and payment of those rents should have been committed to Charles A. Kebler, as was done, with *the consent of Mrs. Robb.* (See Rec., marg. p. 232.) But if a question of selling the property in which the principal sum was invested had arisen, Mr. Strong would undoubtedly have been as active as Mr. Robb, and indeed more so, on account of his experience as a lawyer. And so the statement of counsel (Brief, p. 40), that Mr. Robb was the managing trustee, is entirely assumed. Equally unfounded is the other statement of counsel, that James H. Robb and Charles A. Kebler were the only persons who knew whether Kebler had or had not authority. Mr. Strong must of necessity have known whether Kebler had authority to consent to a sale of this property, as no valid

authority could have been given to enter appearance and give consent without his participation. Why have two trustees if one can sell the whole fund without the knowledge of the other?

"Where a settlor vests his property in several co-trustees, they all form, as it were, one collective trustee; therefore they must perform their duties in their joint capacity, even in making a purchase. In law there is no such person known as an *acting* trustee apart from his co-trustees. All who accept the office are acting trustees. If any one trustee who has accepted refuses to join in the proposed act, or is incapable, the others can not proceed without him, but an application must be made to the court. So if trustees bring suits, or defend suits in court, they must act jointly, and they shall all employ the same counsel. If they sever in their defense, and incur extra costs, they might be compelled to bear them personally."

1 Perry on Trusts, § 411.

The testimony of Mr. Strong on this subject we insert:

"Q. Please state whether or not you were ever advised, by the said Chas. A. Kebler, of the bringing or pendency of a suit in the Court of Common Pleas for the county of Hamilton, in the State of Ohio, in which Meyer Gugenheim was plaintiff and yourself together with Moritz Loth and others were defendants.

"A. I never was advised by him of such a suit.

"Q. I show you a summons in this case upon which appears a written acceptance of service on behalf of James Hampden Robb and Charles E. Strong, trustees, by Kebler & Roelker, attorneys. Please state what authority, if any, you gave for such acceptance.

"A. I never gave any authority of any description.

"Q. I now show you a summons issued on the cause of action of the First National Bank of Cincinnati, on which

appears a like acceptance. Please state what authority, if any, you gave for such acceptance.

"A. I never gave any authority for such acceptance of service.

"Q. I now show you the answer and cross-petition of James Hampden Robb and Charles E. Strong, trustees, filed December 16, 1885, by Kebler & Roelker. Please state what authority, if any, you gave for the filing of such answer and cross-petition.

"A. None whatever.

"Q. I now show you a paper purporting to be the answer of Robb and Strong to the answer of William Stix. Please state what authority, if any, you gave for the filing of such paper.

"A. None.

"Q. I also show you a decree entered in said cause on the 15th day of February, 1887, upon page 260 of the Minutes of said court, wherein it is recited that it is ordered, with the consent of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, that the fee simple of the title of said premises described in the mortgage of William Stix be sold, and said premises sold free of the claims of Henry W. Taylor and Charles E. Strong and James Hampden Robb, trustees, and all other parties to this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale. Please state what authority, if any, you gave to Mr. Kebler or any other person to consent to such order.

"A. None whatever.

"Q. Please state when you first heard of the existence or pendency of this suit before referred to.

"A. I first heard there was such a suit shortly after the death of Mr. Kebler; that is, either in the latter part of 1887 or early part of 1888.

"*Q.* Please state what, if any, connection you held personally with Mr. Charles A. Kebler with reference to this trust.

"A. I never had any personal connection with him in regard to this trust or any other matter." (Record, p. 122.)

Neither Mr. Strong nor Mr. Robb could have testified except to their own acts, for under no circumstances could either have sworn that the other had given no authority.

But the equity rule requiring two witnesses or corroborating circumstances has no application to this case. That rule is correctly stated in *East India Company* v. *Donald*, 9 Vesey, 275, as follows:

"That where there is nothing *more* than the positive, unqualified assertion of one witness, and a positive denial by the defendant, plaintiff is not entitled to a decree. The exception is upon circumstances giving greater credit to the witness." (Italics ours.)

It states the reason for the rule (p. 283) to be the practice, by bill of discovery, of obtaining evidence upon which to found or defend an action at law. This was in effect making defendant a witness and giving his sworn answers the force of a deposition. Still, the evidential effect was judged by the ordinary rule. If the subject of the denial was something the witness had personal knowledge of, his sworn answer amounted to proof; otherwise it did not. So with an answer at the present day. In this case Vos had no knowledge whatever on the subject of Kebler's authority or want of authority, and, therefore, had no right to swear to an answer denying absence of authority. His denial, instead of being made positive, should have been upon information and belief. On that subject this court has said:

"What are the circumstances in this case to meet and outweigh the denial in the answer? It is to be borne in mind that the bill does not charge the agreement to have been made with the bank, but with their attorney. The denial by the bank is not therefore of any matter charged to

have been within *their own knowledge. They could, therefore, only speak of their belief, or from information received from their attorney, and not from their own knowledge of the transaction.*" (Italics ours.)

Union Bank of Georgetown v. *Geary*, 5 Peters, 111.

A more marked case is that of *Clark's Executors* v. *Van Reimsdyk*, 9 Cranch, 153. It was a suit in equity by Van Reimsdyk against the personal representative of John Innes Clark and others, praying that defendants be decreed to pay complainants the amount of a bill of exchange in favor of Van Reimsdyk, drawn at Batavia by Benjamin Munro on Amsterdam for 21,488 guilders, on account of advances made by Van Reimsdyk for the use of defendants, who were part owners of a ship trading with the East Indies, and of which Benjamin Munro was super-cargo. The draft was given for money obtained and used to purchase a return cargo. A sworn answer was filed by the representatives of Clark denying the authority of Munro to draw the draft. The answers and depositions of the other defendants were excluded from evidence on account of their interest, being partners with Clark. No other proof was in the record, except the conduct and circumstances and some letters, which were held sufficient to sustain the bill. This court, through Chief-Justice Marshall, speaking of the rule about which we are now talking, said:

"If a defendant asserts a fact which is not and can not be within his own knowledge, the nature of his testimony can not be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. . . . These traits in the character of testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or a deposition.

The respondents could found their assertions only on belief; they ought so to have expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what, in the nature of things, they could not know, can not give to their answer more effect than it would have been entitled to had they been more circumspect in their language." (See pp. 160, 161.)

So, had Vos been more circumspect and less reckless, he would not have made his denial otherwise than upon belief.

See also *Long* v. *White*, 5 J. J. Marshall, 228.

But besides the positive evidence of the two complainants, there are abundant circumstances showing beyond a doubt that Kebler acted without authority. His whole conduct is inconsistent with the existence of such authority. He swore to interrogatories addressed to Robb and Strong by plaintiff in the Gugenheim suit (Record, p. 32), when he knew as a lawyer that such answers could be sworn to only in person, *that testimony can not be given by deputy.* The manner of Kebler's death, the amount and character of the indebtedness he left, rebut any favorable presumption in his behalf. The testimony shows that the property having been sold April 16, 1887, Kebler continued to delude this old lady, Mrs. Ellen W. Robb, who depended upon these rents for a living, by paying her small sums of money from time to time. She tells of an interview on the 21st day of September, 1887, with Kebler, at her house at Cheviot, wherein she produced a book showing that the amount of the rent or income due her to that date, as she had set it done, was $400. He promised to return in two weeks and make a settlement; there being "$400 due, which he said *he would keep and pay me interest thereon*, to which I agreed." This was the last time she saw him. He did keep the money. All this while Kebler did not even hint that the land had been sold, and her living destroyed; for the old lady testifies that she

never heard of the fact that Kebler had sold the land until the fall of 1888, nearly eighteen months after the sale took place. Is it credible that, if Kebler had had authority to enter appearance or to consent to the sale, he would not have told Mrs. Robb that the land had been sold by consent of Robb and Strong?

Moreover, Stix, the co-defendant of Vos, did not undertake to deny Kebler's want of authority by either his answer or amended answer, which shows that he was satisfied that Kebler had no such authority, although his counsel now makes a different claim in regard to Vos.

We are asked by our adversaries why we did not call Mr. Roelker as a corroborating witness to prove Kebler's want of authority. The answer is obvious. We understood, and yet understand, that Mr. Roelker denied in his answer in the Coppock case (Record, p. 163) all knowledge of any transactions concerning Robb and Strong in the Gugenheim case, and it has never been pretended that there were any other "dealings" involving Robb and Strong than the occurrences of that case. That Mr. Roelker had, as we understood, asserted his want of knowledge of Kebler's connection with the Gugenheim case so far as it concerned Robb and Strong, would be a sufficient reason why we did not call him as a witness. Our adversaries, however, say that we misunderstand the statements in Mr. Roelker's answer; that those statements only deny knowledge of *the embezzlement*, and not knowledge of Kebler's want of authority. If our adversaries knew that Mr. Roelker had knowledge on that subject and could give testimony, it is quite pertinent for us to inquire why they did not call him to show that Kebler had been authorized to enter this appearance, *if they now mean to intimate to this court that Mr. Roelker would have so testified.* And if they do not mean to intimate such a thing, their observations on the fact that complainants did not call him are quite out of place.

Our adversaries seem also to claim that the answer filed by Robb and Strong in the Coppock case (see their brief, p. 41) in some way contradicts the depositions given by Robb and Strong in this case as to Kebler's want of authority. But we do not see how it has that effect. It was not incumbent upon Robb and Strong to state in that answer any of the circumstances under which the appearance of Robb and Strong, trustees, was entered by Kebler. They therefore stated only that the appearance had been entered. Their view was, that whether the entry of the appearance was with or without authority, Mr. Roelker was equally liable, and hence it was not necessary to be specific on that point. There is nothing in that answer and cross-petition inconsistent with the claim that the appearance of Kebler was totally unauthorized.

Our opponents say that our contention that Robb and Strong were incapable of ratifying this sale, Vos and Stix having notice of the trust, would perhaps be true if the subject of the trust was land, which they say it was not. We say it was land. The history of this trust is given in our former brief, but we may be pardoned making special reference to it here, in view of the above claim of our adversaries. The trust was the outgrowth of an agreement between the distributees (children) of James Robb, deceased, his creditors, and his administrator (the same Charles A. Kebler), whereby it was agreed in writing between them that "the proceeds of the sale of the land aforesaid, or so much as necessary" (the land referred to was the land of which James Robb died seized), "shall be set apart and invested for two trust funds, as follows:" (the first trust fund we are not concerned with here, and omit mention of it); "the other of the said trust funds to be sufficient to secure and pay to Mrs. Ellen W. Robb an annuity of six hundred dollars for and during the term of her life, payable semi-annually, and to commence from the —— day of ——, ——, and from and after her de-

cease to pay the said Mary Robb, her daughter, if she survives her mother, an annuity of three hundred dollars, payable semi-annually, for and during the term of the life of said Mary." The agreement then continues: "The *appointment of trustees* and appropriation of funds necessary and sufficient for the two trusts aforesaid shall be effected as soon as practicable by the said Charles A. Kebler, the administrator, *and the parties concerned.*" (See par. 4, p. 2, Add. Record.) This agreement was not signed by Robb or by Strong as trustees. The trustees were no party to it. It was not an agreement of trust, but an agreement *for* a trust. The amount of the money to be set apart and invested was not designated, but was left to be determined by the administrator. The appointment of trustees was also left to be determined by the administrator; also the "appropriation of funds necessary and sufficient for the trust" was a matter left to the administrator. In other words, the trust did not vest in the trustees at all until after the money was converted by the administrator into land. The testimony of James H. Robb in this connection is important. He is asked the question:

"Please state whether or not you are the same James Hampden Robb named as a grantee in this deed from Moritz Loth to James Hampden Robb and others." (This deed being the one conveying the premises in trust after the money had been used by Kebler to buy the land.)

"A. I presume I am; certainly; Mr. Strong and myself.

"Q. Please state whether or not that deed was executed to you and Mr. Strong as trustees in pursuance of a written agreement now shown you.

"A. I have always supposed that it was." (The written agreement shown the witness is the paper providing for the trust. Record, mar. p. 228.) Moritz Loth, the grantor in the trust deed conveying the land to Robb and Strong, trustees, says: "I called on John Kebler" (this John Kebler was the father of Charles A. Kebler), "and the result of my in-

terview with him on the subject was the execution of a deed for $10,000, and they gave me back a lease of the same property with a privilege of purchase." (Rec., marg. p. 270.)

It is thus obvious that the money never came into the hands of Robb and Strong, but that the investment was made by Charles A. Kebler, administrator, with the aid of his father, by buying the land from Loth and having it conveyed to Robb and Strong as trustees. All that Robb and Strong as trustees ever had was the land. The settlors of the trust left to Kebler the selection of the investment. He selected this real estate; made the purchase of it and obtained the deeds therefor. The title of Robb and Strong as trustees in the trust subject was created by these deeds and not otherwise.

Our opponents in commenting upon the case of *Morris* v. *Robinson*, 3 B. & C. 196, cited by us at p. 35 of our brief, say that the proceeds of the sale of the indigo, for payment of which claim was made by application to the registrar of the Vice Admiralty Court at the Mauritius, had been previously remitted to England. But that fact would make no difference. The attorneys who filed the application supposed the proceeds were still in court, not knowing of their having been sent to England. It is entirely inconsistent with the theory of the law contended for by our adversaries to claim that the presence of the money in court could have any bearing. According to their contention any application for payment ought to be a ratification.

It is claimed that Robb and Strong, trustees, had Vos and Stix at their mercy, and were guilty of laches or negligence in not bringing this action sooner. Robb and Strong are even charged with concealing from Vos and Stix, to their detriment, the fact that Kebler had entered this appearance without authority. Counsel can hardly be taken seriously

in this claim when it is called to mind that the purchase by Vos and Stix was in April, 1887; and that during the month of May following they paid in their money, received their deeds and entered into possession; and that Robb and Strong were in ignorance of the fact that the property had been sold until sometime after November 23, 1887, the date of Kebler's death. What could Vos and Stix have done to better their position had they been served with written notice by Robb and Strong, at the instant they learned the fact, that claim would be made to regain their title? Counsel also say they have been deprived of recourse against Kebler's estate. But in such statement they can hardly be in earnest. Under the laws of Ohio, when a person dies, all claims against the decedent become a lien upon his estate. To make such claims effectual it is only necessary to present them to the administrator for allowance. If such claims be rejected by him suit is brought against the administrator. The object of such suit is merely to establish the verity of the claim. No administrator in Ohio can distribute any portion of the estate until after a year from the time of the decedent's death, and no suit can be brought against such administrator for a distribution of the estate until eighteen months after the death of the decedent. The administrator in this case was appointed December 1, 1887, so that the assets of Kebler were intact for at least a year after that time, if, indeed, there has been any distribution of them yet. This record shows (the Coppock case) that the administration of Kebler's estate was complicated and delayed owing to the confusion in his affairs. The claim of Vos and Stix against Kebler's estate was as good the day this suit was brought as it ever had been.

We refer to the administration laws of Ohio by the following brief summary to sustain what we have said above:

Sec. 6062 of the Revised Statutes of Ohio requires an administrator to collect the assets of the estate within one year

after the date of the administration bond as far as he is able.

Sec. 6063 provides that, if from the situation of the assets more time be needed, the court may extend the period of administration.

Sec. 6066 provides that this extension period shall not exceed five years.

Sec. 6074 provides the order in which decedent's debts shall be paid, giving preference only to funeral expenses, costs of administration, widow's first year's allowance, and taxes. All other claims to be paid ratably.

Sec. 6108 provides that no executor or administrator shall be liable to the suit of a creditor of the deceased until after the expiration of eighteen months.

The case of *Leather Manufacturers Bank* v. *Morgan*, 117 U. S. 96, 114, 115, instead of being "extremely pertinent," as counsel claim (see their brief, p. 65), is far removed from this case. That case related to the duty of a depositor of a bank to examine, with reasonable diligence, his pass-book and to report errors if any exist. It proceeds upon the theory that the return of the pass-book with paid vouchers is like an account stated. The decision was also placed upon the same principle that makes it incumbent upon a bank, receiving from a depositor counterfeit money, to speedily notify the depositor; and upon the same principle which requires a party receiving payment at a bank counter to report any bad bills handed him. But Mr. Kebler did not send to Robb and Strong any list of cases wherein he had appeared for them as counsel, nor any bill for services, nor account of moneys embezzled.

Nor does the case, cited by our adversaries, of *Ryan* v. *Doyle*, 31 Iowa, 53, that payment of an attorney's fee for his services in a case is a ratification of appearance therein, apply here. We have not paid Kebler a fee for his valuable(?)

services "*on behalf*" of Robb and Strong in the Gugenheim case. The administrator has not presented a bill yet!

There are some other cases cited by our opponents not commented upon in our original brief that we shall next consider.

Merrill v. *Rokes*, 54 Fed. Rep. 450, cited by counsel at page 59 and again at page 85 of their brief, does not bear out their statement that *mere* demand of the proceeds realized upon a sale of goods made by one purporting to be the agent of the owner, constitutes a ratification of that sale. In that case the court said:

"The cause of action pleaded was for the negligence of the defendant in failing to collect the two Mooney notes, but the verdict rests upon a cause of action for this $1,820.56, money had and received by defendant for plaintiff." (See p. 454.)

This judgment the court reversed solely for the reason that it was not supported by the pleadings (see p. 453), the court saying that any other error relating to that cause of action (the second cause of action in the case) need not be considered. But in view of a second trial the court did go on to observe that the plaintiff's claim for the *entire* proceeds, $1,820.56, without allowing deductions for attorney's fees and other expenses incurred by defendant in obtaining the $1,820.56, was untenable, as the principal could not receive the benefit of an agent's acts without taking the burden. It was in that connection the court mentioned that the plaintiff had on July 28, 1890, served a written notice on the defendant, claiming that the money received, $1,820.56, "less all legal claims for attorney's fees and costs," should be paid him. Of this demand the court further said:

"This demand, which was urged at the trial and was the basis of the plaintiff's *recovery*, was a ratification of the acts of the defendant." (Agent.)

We submit this is far from being an adjudication that

mere demand amounts to a ratification. However, all the court said beyond the judgment of reversal was *dicta*.

Heller v. *Elliott*, 45 N. J. L. 564 (counsel's brief, p. 72), decided that where goods had been sold for cash and delivered by the seller without receipt of the money, and the seller afterward brought suit for the price, and issued an attachment, he could not, upon dismissing the attachment, maintain an action for the goods against one who had purchased them from the original vendee. There the delivery of the goods, without requiring the money to be paid, was in itself a waiver by vendor of the very condition of which he sought to avail himself in the suit against the purchaser. Such waiver would have deprived the plaintiff of the right to recover, whether the proceedings in attachment for the price had or had not been begun.

Bach v. *Tuch*, 126 N. Y. 53, was an action for the price of the goods, and was carried on to judgment and to the general term of the Supreme Court of New York.

Wilmot v. *Richardson*, 4 Abb. App. Dec. 614, cited in their brief at page 71: The syllabus and portion of opinion cited by counsel do not present the case sufficiently. There was a sale of flour by Wilmot to one Patterson, who received from Wilmot a memorandum of the sale, termed in commercial circles a "sold note." The flour, sold through McKeam, a broker, seems to have been delivered aboard a ship at New York bound for Liverpool. Patterson, before the sailing of the ship, obtained from defendant, Richardson, an advance on the flour in the faith that it was Patterson's property. The ship's receipts for the flour were delivered by plaintiff to McKeam, the broker, *conditionally*, as the plaintiff said, to be handed over to Patterson upon his payment of the full price of the flour; otherwise to be returned. But they were delivered to Patterson by the broker without getting the money, and by Patterson to the defendant, presumably, without knowledge on their part of the condition to

return them if the money was not paid. The defendants were thus possessed of the shipping documents without notice of Wilmot's ownership in the flour. After Wilmot had received from Patterson $5,000, in further payment of price of the flour, he for the first time called upon the defendants. Negotiations then ensued resulting in Patterson giving an order in favor of the plaintiff on the defendant for the net proceeds to accrue from transactions between Patterson and the defendant, the defendants at the same time writing to the consignees of the flour in Liverpool to retain all proceeds of sales for defendants' benefit. Twenty-eight hundred and eleven and 27-100 dollars of the proceeds of sales of the flour in Liverpool were thereafter paid to Wilmot, who receipted for the same, *as in full of balance of proceeds of sales of flour* per "your acceptance of Walter Patterson's order in our favor." After the giving and receipt of this order, but before any money was paid thereon, plaintiff sued Patterson for the price of the flour. He afterward sued Richardson for the proceeds of the same flour, to the extent that his claim against Patterson was unpaid, as for money had and received by Richardson to his use. Richardson's defense was that he had received no money to defendant's use; that plaintiff had sold the flour to Patterson, and Patterson had sold it to defendant, and that plaintiff had received in payment the orders before mentioned. The court, in its opinion, spoke of the previous suit of Wilmot against Patterson as a ratification. But it was evidently neither ratification nor election of remedies, but only a case where one, having sold flour for cash, had waived his right to be paid in cash by accepting an order in lieu thereof. We quote the following brief passage from the opinion of Peckham, J.:

"There may have been considerable question whether they" (they means the plaintiffs; we have spoken of but one, though there were more) "could, under the circum-

stances, disaffirm the sale. There is *none* whatever as to authority or power to ratify it."

How one can ratify a sale which he had no power to disaffirm seems a mystery.

At another place, the court, speaking of the fact that the plaintiff had collected part of the proceeds of the flour upon the order before referred to, said:

"*They thus, in substance, affirmed or sanctioned its sale* in Liverpool by the defendants and ratified the sale to Patterson."

Mr. Keener, in his recent work in Quasi-Contracts, speaking of what amounts to conclusive election, says:

"An unsatisfied demand will not preclude plaintiff from electing between two remedies."

He then reviews a number of cases, and, among others, some cited by our opponents. Among them are *Thompson* v. *Howard*, 31 Mich. 309, cited at p. 72 of their brief; *Terry* v. *Munger*, 121 N. Y. 161 (commented on in our original brief at p. 66), and shows they were both wrongly decided, and that the Tennessee case, *Huffman* v. *Hughlett*, 11 Lea, 549, cited by us in our original brief at p. 54, states the doctrine correctly.

Keener on Quasi-Contracts, 203–213.

Respectfully submitted,

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